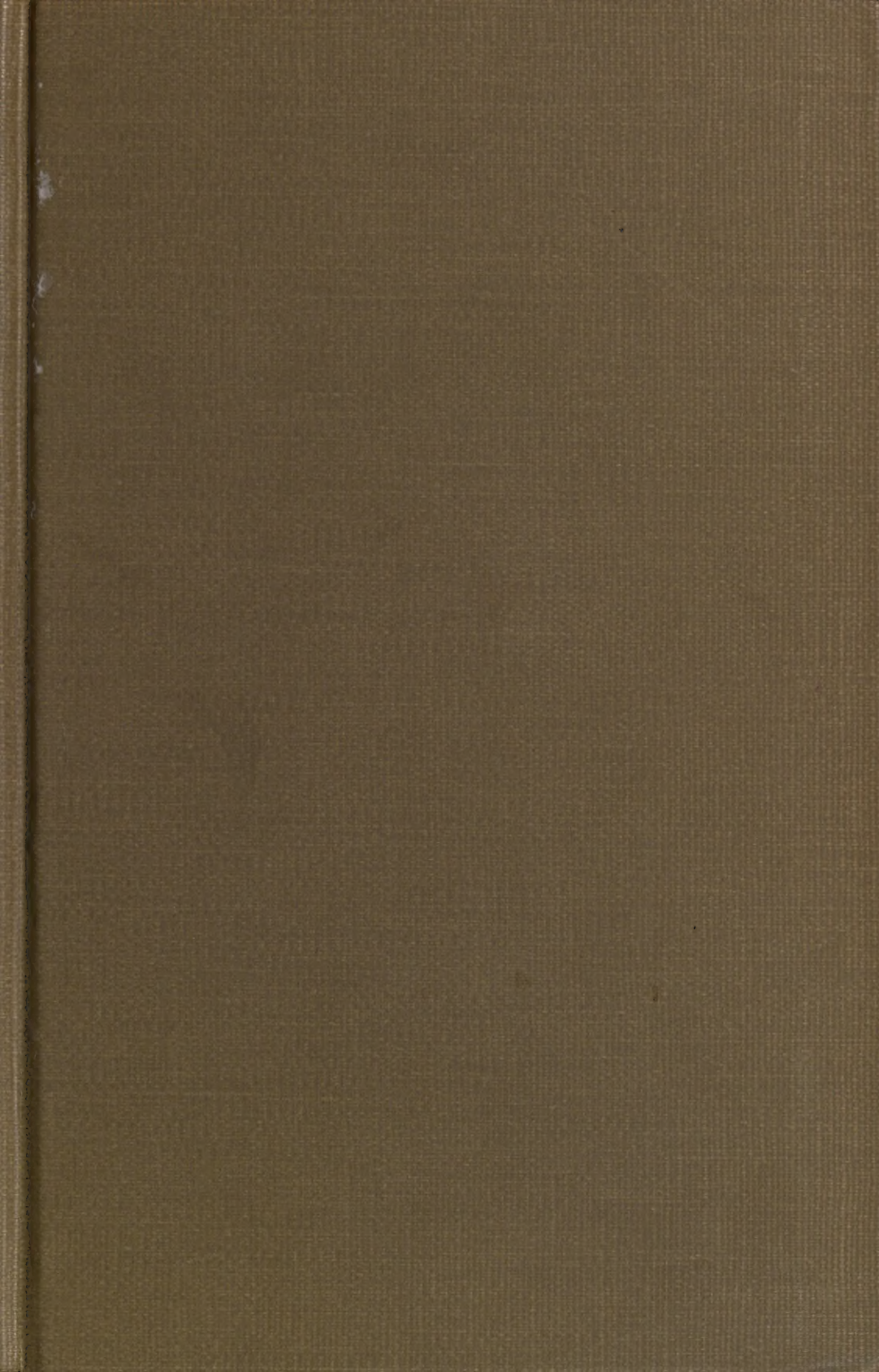






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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

DECEMBER TERM, 1878, ENDING JULY 31st, 1879.

BY

THOMAS G. JONES,

STATE REPORTER.

40622
VOL. LXII.

MONTGOMERY, ALA.:

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GEORGE W. STONE, ASSOCIATE JUSTICE, *Montgomery, Ala.*

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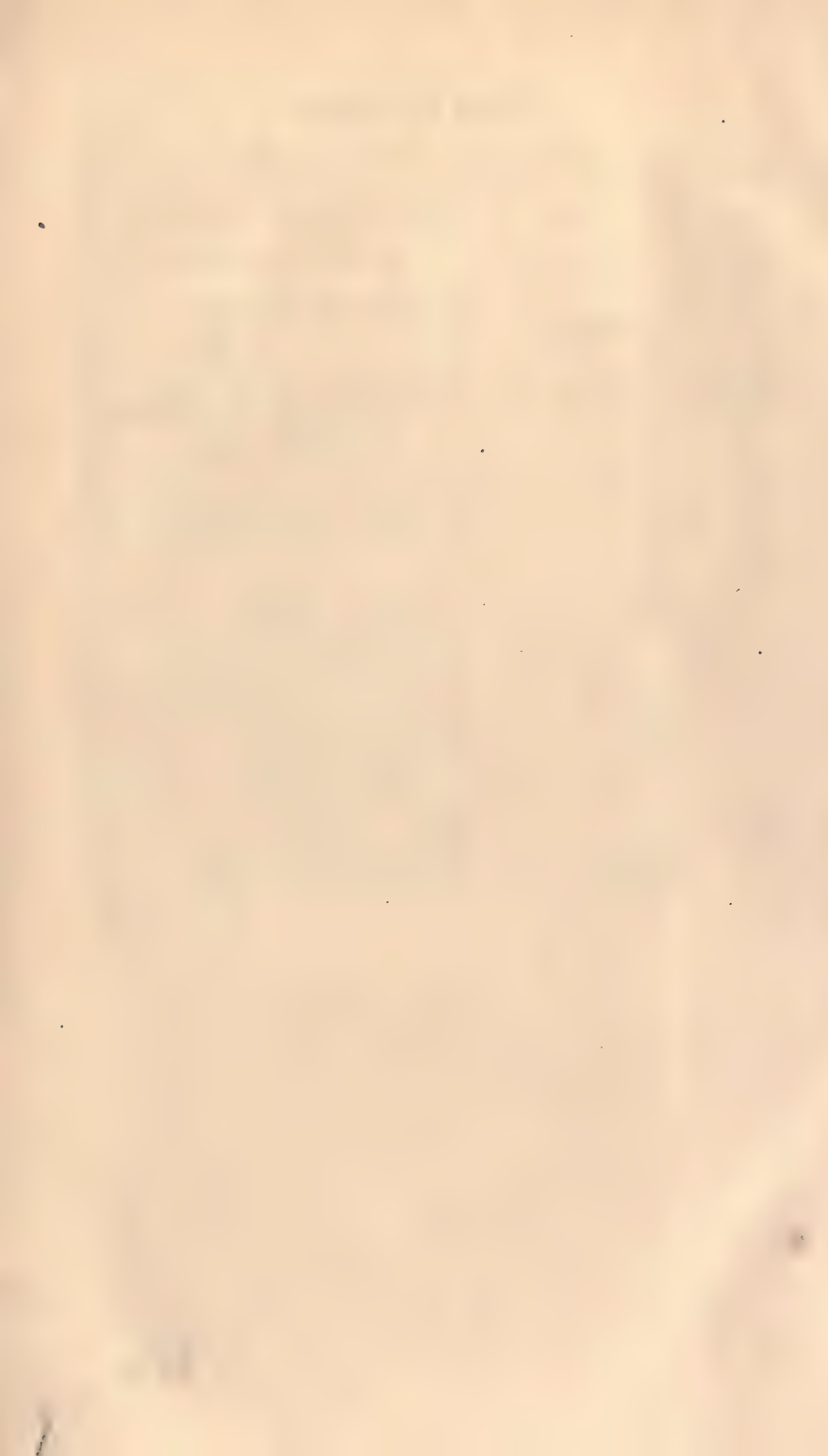
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CASES
IN THE
SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1878.

Ex parte Hunt & Tally.

Application for Mandamus.

1. *Set-off; what not subject of.*—When exempt property claimed as such, is sold under execution against the owner, who thereon obtains judgment against the sheriff, and those indemnifying him for a conversion, the defendants cannot set-off against it, under the provisions of section 2993 of the Code, a judgment in their favor in the same court, against the owner of such exempt property; for if this were allowed, a creditor without right to subject such exempt property could do so in fact, and devote the proceeds of the sale to the payment of the debt, overruling the constitution and statutes, and escaping liability therefor, by the machinery of a set-off.

Motion for a *mandamus* to the Circuit Court of Jackson county upon facts set out in the opinion.

CLOPTON, HERBERT & CHAMBERS, for motion.

BRICKELL, C. J.—The facts as disclosed by the application for *mandamus*, and the accompanying record, are, that Wiley Cotton recovered in an action of trover against the appellants and one McMahan, sheriff of the county of Jackson, a judgment for one hundred and six dollars, for the conversion of a lot of plank. The conversion consisted in the levy and sale of the plank under execution against Cotton, he claiming the plank as exempt, and the applicants having indemnified the sheriff to make the levy and sale. After the rendition of the judgment, the appellants moved to set-off against it to the extent of the damages (exclusive of costs), a prior judgment rendered in the same court in favor of Pique, Monier & Co., against Cotton, which had been assigned to them before the commencement of the action of

[Ex parte Hunt & Tally.]

trover. The motion was refused, and the present application is for a *mandamus* compelling the court to allow the set-off.

The statute authorizes the court in which judgments are rendered on motion to set-off the one against the other (Code of 1876, § 2993); and *mandamus* is the remedy which has usually been pursued to compel the court to allow the set-off when refused. The controlling question is, whether the judgment for the conversion of chattels, (the judgment itself conclusively ascertains, were exempt from satisfaction of debts,) is subject to set-off, and thus made to pay debts. The principle which must govern in deciding the question, was settled in *Falconer v. Head*, 31 Ala. 513. The statute then of force exempted from levy and sale for the payment of debts, enumerated articles of personal property. Some of these having been levied on by attachment, the debtor sued the officer making the levy in detinue for their recovery, and obtained judgment against him for the restoration of the property, or the payment of its value as assessed by the jury. The assessed value was paid by the defendant to the clerk of the court, and the creditor sought to reach the money by garnishment. The statute secures to a successful plaintiff in detinue, the right of compelling the restoration of the property by *distringas*, or by attachment. This court said in deciding that the garnishment could not be maintained: "If we were to decide otherwise, we should give to the plaintiff in the garnishment the mastery over the exemption law, and arm him with an *election* which the law has secured to the successful plaintiff in the action of detinue." It is obvious if the set-off were allowed, the appellants would, by indirection, gain the mastery over the constitution and the statutes which freed the property converted from liability for the payment of debts; for by regular process of law operating directly on the property, the petitioners for making levy and sale of it, have been adjudged tortfeasors, and rendered liable to pay its value. Of what avail is the judgment, or the exemption to the debtor, if so soon as the judgment is obtained, it may be extinguished by the machinery of a set-off? He is deprived of the property, and of his constitutional and statutory rights, and the creditor it may be, who set these at defiance, profits by his wrong. The judgment for the value of the property, so far partakes of the character of the property, as to connect itself with the right of exemption which was attached to the property.—Thompson on Homesteads, §§ 748, 892, 893. The Circuit Court did not err in disallowing the set-off.

The application for *mandamus* is refused.

Hutchinson v. State.

Indictment for Carrying Concealed Weapon.

1. *Pistol; what constitutes, within the meaning of statute against carrying concealed weapons.*—A person who carries concealed about his person, all the pieces of a pistol, which could readily be put together so as to make an effective weapon, is guilty of carrying concealed weapons, though at the time he carried them concealed, the pieces were separate and incapable of use as a fire-arm until put together.

APPEAL from Coffee Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The appellant, Neal Hutchinson, was tried and convicted of carrying a pistol concealed about his person.

On the trial it was shown that the cylinder of the pistol was taken apart from the barrel, and while thus separated, the appellant carried the pieces concealed about his person. It was shown that the pistol could not be fired, either by the lock or by a match, at the time it was put in the pocket of the appellant. It was also shown that all the parts of the pistol were perfect, and could have been put together.

Upon this evidence the court charge the jury, among other things, "That if the cylinder only was separated from the barrel and the defendant put the two parts of the pistol thus separated into his pocket, and concealed them, and that the cylinder of the pistol could have been easily and readily adjusted for use so as to make it fire, then he would be guilty of carrying concealed weapons, although they may believe that the cylinder of the pistol was separate from the barrel at the time he put it in his pocket." To the giving of this charge the defendant excepted, and requested the court to give the following written charges, which the court refused, and to which refusal an exception was taken: 1st, "That if the jury believe, from the evidence, that at the time the defendant is charged with carrying the pistol concealed, that the pistol was in pieces so that it could not be fired either by the lock or by applying a match to it, then it would not be such a pistol as the law prohibits the defendant from carrying it concealed." 2d, "That if the jury believe, from the evidence, that the pistol was in pieces, that the cylinder of the pistol was separated from the barrel so as it could not be fired without readjusting of it, and that it was not readjusted and the defendant only put the pieces in his pocket, then he

[Holding v. Thomas.]

would not be guilty of carrying concealed weapons within the purview of the law."

W. D. ROBERTS, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

MANNING, J.—Appellant was indicted for carrying a pistol concealed about his person. The evidence was that the cylinder of the pistol was separated from the rest of the fire-arm, and both parts carried by defendant in his pocket, without any thing to prevent an easy readjustment of the parts, to make the weapon effective.

Under the authority of *Atwood v. State*, (53 Ala. 508), and the cases therein referred to, we hold that the Circuit Judge did not err in the charge given, or in his refusals to charge as requested.

Let the judgment of the Circuit Court be affirmed.

Holding v. Thomas.

Motion to compel Sheriff to Pay taxes on Property sold under Execution.

1. *Code of 1876 ; § 419 of, construed.*—Section 419 of the Code, which makes it the duty of a sheriff selling property under a levy, to ascertain what taxes are due upon the property, or by the owner thereof, and upon a sale, to pay the taxes found due to the tax collector of the county, &c., is not a remedial statute, and cannot be extended by construction, beyond the plainly expressed intention of the Legislature.

2. *Same.*—The statute has no application to taxes due to, and collectible by a municipal corporation, but relates only to State and county taxes.

APPEAL from Madison Circuit Court.

Tried before Hon. LOUIS WYETH.

The opinion states the case.

BRANDON & JONES, for appellant.

IRVINE WHITE & GEORGE S. GORDON, *contra*.

MANNING, J.—Appellant, purchaser at a sheriff's sale of real estate in Huntsville and its vicinity, moved the court for an order requiring the sheriff to pay taxes that had accrued thereon, out of the proceeds of the sale. These taxes

[Holding v. Thomas.]

were in part due to the State and county, and in part to the city of Huntsville for municipal purposes. The judge ordered that the sheriff pay the former, but not the municipal taxes; and the appeal is from the latter part of his ruling.

A sheriff who sells property to satisfy a writ of execution and judgment against the defendant, has by virtue of that writ or of his office, no concern with the taxes that may be due from the defendant, unless some duty in respect of them, is imposed upon him by statute. He is not the officer charged by law with the collection of taxes, but an officer of the court, while so acting, to execute its judgment. By the common law, the purchaser of the property, if taxes be due thereon, would take it *cum onere*, and the sheriff be required to pay the plaintiff in the execution the proceeds of the sale, less the costs that are taxed and his commissions, the sums being ascertained. But in the revenue act of March 6, 1876, a section was introduced which constitutes section 419 of the Code of 1876, whereby, without distinction between realty and chattels, it is declared to be "the duty of the sheriff when he has made a levy, to ascertain what taxes are due upon the property levied upon, or from the party owning the same, and upon sale thereof to pay the taxes so found to be due to the tax collector of his county out of the first money received by him from such sale."

This introduction of other matter into causes that have been decided, and committing in part the determination of questions that may arise thereupon, to the ministerial officer of the court, while engaged in the duty of carrying into effect its judgments according to the precise terms of the precepts issued to him, may in some cases lead—and perhaps be used—to produce serious delays and embarrassments. We see nothing in the statute which affords support to the argument that it should be construed as a remedial enactment. It is rather in derogation of those long established rules of the common law which have been considered essential to the effectual performance by judicial tribunals, of their indispensable functions, and therefore should not be extended beyond the plainly expressed intention of the Legislature.

The section in question is (as we have said,) a part of the revenue law of March 6th, 1876. The same act provided for the levy by the Courts of County Commissioners, of county taxes also, upon the property assessed for those of the State. And we cannot suppose that while legislating for the levy and collection of State and county taxes only, the Legislature intended to send out a sheriff, who was charged to make and pay to a plaintiff, money that was adjudged to be due him, to find out how much he should reduce the sum arising from

[Evans v. The State.]

sales made only for that purpose, by taxes the defendant might owe to towns and cities. The requirement that he shall "pay the taxes so found to be due, to the tax collector of his county," who is also the tax collector of the State, clearly indicates that the act related only to State and county taxes.

The Judge of the Circuit Court did not err in this particular; and his judgment must be affirmed.

Evans v. State.

Indictment for Murder.

1. *Change of venue; ruling of lower court on, not revisable.*—The decision of the primary court refusing a change of venue, is not revisable.

2. *Copy of indictment served on prisoner; when objection to correctness of, comes too late.*—After pleading to a valid indictment, taking part in empanneling of a jury to try the issues, and entering upon the examination of witnesses, it is too late to raise the objection that the copy of the indictment served on the prisoner is incorrect, unless it be made manifest that thereby the defendant has been put to a disadvantage, which would probably lead to an unjust verdict against him.

3. *Evidence; what admissible.*—Conversation or remarks of the prisoner "a short while before the killing, while in company with the deceased and others," is admissible in behalf of the State, if relevant to the issue; and its admission, if not relevant, is not ground of error, if the testimony was favorable to the defendant.

4. *Same.*—A remark of the defendant to a witness, on seeing the deceased ride up to a church, two or three years before the killing, "there is a man I cannot get along with," though of little weight of itself, is relevant and admissible testimony, and is properly admitted, when the only objection urged is that it is not legal or lawful evidence.

5. *Charge; what not erroneous.*—The day of the homicide the defendant borrowed a "Rodgers knife," having a single blade four inches long, from a neighbor, saying "I may need it," and then went to a town, on his return from which that night the homicide was committed. After three other persons had started on horse-back the defendant overtook them, and furnished a bottle of whisky, out of which three out of the four, defendant among them, drank until they became intoxicated. After this, defendant commenced abusing a brother of deceased, whereupon deceased said he would defend his brother. Defendant and deceased then got down and fought a short time in the dark. Deceased received five cuts from a knife, and died almost immediately. Defendant was bruised and had his ankle sprained. The court, after giving a general charge, and after charging the law as to persons voluntarily engaging in sudden fight, and one killing the other without any pre-existing malice, and that it would be manslaughter in the first or second degree, as the killing was intentional or unintentional, said further: "And to enable you to determine the intent, you may look to the proof in regard to the weapon, and the manner and extent of its use. One is presumed to intend what he really does do, with the use of those means which ordinarily and naturally accomplish the result. Thus, if one in such a fight should use a knife, capable of inflicting a mortal wound, and with it wound his antagonist four or five times, so that he

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died from it almost immediately, the intention to kill might be inferred from the use of such a weapon. If, however, death resulted from fist or foot, or severe fall, the inference of the intent to kill might well be different." *Held*: The charge was not obnoxious to the objection that it singled out particular facts, and gave them too much emphasis; nor was it otherwise erroneous or unfair.

6. *Charge; what erroneous.*—It is not error to refuse a charge in a criminal case, "if any individual juror is fully convinced from the evidence, beyond a reasonable doubt, that the defendant is guilty of any particular degree of homicide, and he becomes fully satisfied that his fellows will not agree with him, he might from considerations of public good, and in order to agree with his fellow jurors, find the defendant guilty of a lower degree of homicide, or even find him not guilty; but it would be rank injustice to the defendant, and a failure to perform the high duty devolved on him as a juror, if he should, against his own conviction from the evidence, in order to agree with his fellows, find for a higher offense than he would otherwise have done, or find the defendant guilty, when he otherwise would have found him not guilty."

7. *Indictment of person under alias; what sufficient proof to sustain.*—Where the defendant is indicted in his own name, and also under an *alias*, it is not necessary to show that he was known and called by both names; it is sufficient, if he is identified as the person known by or entitled either of such names.

APPEAL from Jackson Circuit Court.

Tried before Hon. LOUIS WYETH.

The appellant was indicted, under the name of Henry Evans *alias* Henry Rounsiville, for the murder of one Foster. The indictment contained two counts, the first of which charged that appellant unlawfully and with malice aforethought, killed Mack Foster, by cutting him with a knife; and the second count is identical with the first, with the exception of the name of the party killed, which is averred to be Mack Foster *alias* Anthony McKendry Foster. The appellant moved for a change of venue, which the court refused, and he excepted. After the appellant had pleaded to the indictment, and a jury had been empaneled, and the witnesses for the State and defense had been examined, the appellant announced to the court that the copy of the indictment served on him was incorrect. By an examination of the copy served on him, which was produced and proved, it appeared that the first count of the indictment had been omitted, but the second count was correctly copied and served on the prisoner. The court ruled that this was a substantial compliance with the law, and the defendant excepted.

One Pace, a witness for the State, testified "that he (witness) had met deceased and others at Evans' own house, a short while before the killing; that he remained at Evans' house until ten o'clock at night; that he heard no threats; that in a conversation about their ages, witness stated that he was forty years old, when Evans remarked that none of us would live to see forty years more, for the reason that it

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was over the average life, and that they were all talking friendly along." To the admission of this evidence, the defendant objected, "because the same was illegal and unlawful." The court overruled the objection, and admitted the evidence, and the defendant excepted.

One Freeman, a witness for the State, testified "that he saw Evans at church in 1873. When Foster and his wife came up, Evans said, there is a man I cannot get along with. It was shown that Foster was killed in 1877." The defendant objected to this testimony "as legal or lawful evidence in this cause." The court overruled the objection, and the defendant excepted.

It was shown by the State, that on the morning of the day of the homicide, the appellant had borrowed of one Bird, who resided on the same farm with him, a "Joseph Rodgers knife, having a single blade four inches long, saying to the witness at the time, "I wish you would lend me your knife to-day, I may need it." It was shown that appellant was then on horse-back, and about to start to the town of Scottsboro. On the evening of the same day, the appellant overtook the deceased in company with two others. Upon overtaking this party, appellant stated "that he had made a horse swap, in which he had got seven dollars to boot." One of the party then said to him, "if he had made that much he should treat the crowd," whereupon appellant replied that "if any one would go back after it, he would." One of the party then went back and procured a half-pint bottle of whiskey, and all of the party, except the person who had gone back, then drank, and started on home—the two others in advance and appellant and deceased in the rear. After they had ridden in this manner for about two miles, those in front stopped for the appellant and deceased to come up, and when they rode up appellant remarked, "I have just been telling Mack what a damned rascal Jack Foster is, whereupon one of the others said to appellant that he ought not to talk so." Deceased then said to appellant, "Jack Foster is my brother, and you sha'nt talk that way about him, I will defend or protect him." When this was said, both dismounted from their horses and fought a short time in the dark. Foster died a short time after they separated, from the effect of five cuts received by him. Appellant had his eye hurt, and his ankle sprained. The knife used could not be found. It was shown that at the time of the killing, the deceased and appellant were under the influence of liquor. This was substantially all the evidence, and the court, among other things, charged the jury as follows: "When two persons engage voluntarily in a sudden fight and one kills the other without any pre-

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existing malice, it will be manslaughter in the first degree if the killing was intentional, or in the second degree if the killing was unintentional; and to enable you to determine the intent you can look at the proof in regard to the weapon used, and the manner and extent of its use. One is presumed to intend to do what he really does do, with the use of those means which ordinarily and naturally accomplish the result. Thus, if one in such a fight should use a knife, capable of inflicting mortal wounds, and with it wound his antagonist four or five times so that he died from it almost immediately, the intention to kill might be inferred from such a use of such a weapon. If, however, death resulted from the fists, or foot, or severe fall, the inference of the intent to kill might well be different." To the giving of this charge, the defendant excepted. The court further charged the jury that, "where one has, or honestly believes he has, good reason to believe that he is in imminent danger of loss of life or of being maimed, as, for instance, losing an eye, or an ear, or a limb, or is in danger of other great bodily harm, he may, if he cannot otherwise avoid the danger, take the life of his assailant in self-defense, but this principle does not apply in a case where the defendant at the time of the killing had reason to believe himself in danger of battery not involving danger to life, limb, or of great bodily harm. Were the law otherwise every fight between citizens might result in the killing of one or the other according to law. When a defendant seeks to avail himself of this defense, the burden of proof is on him to show that he did believe that he was at the time in imminent danger of such injury." To the giving of this charge the defendant excepted.

The appellant then requested the following charge: 1. "If any individual juror is fully convinced, from the evidence, beyond a reasonable doubt, that the defendant is guilty of any particular degree of homicide, and he becomes fully satisfied that his fellows will not agree with him, he might, from considerations of public good, and in order to agree with his fellow jurors, find the defendant guilty of a lower degree of homicide, or even find him not guilty, but it would be rank injustice to the defendant and a failure to perform the high duty devolved on him as a juror, if he should, against his own convictions from the testimony, in order to agree with his fellows, find for a higher offense than he otherwise would have done, or find the defendant guilty when he otherwise would have found him not guilty." The court refused to give this charge and the appellant excepted. The defendant also requested the following charge: "That when a person's name as a defendant is necessary to be men-

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tioned in an indictment, and the person or defendant is mentioned with unnecessary particularity, all the circumstances of description must be proved as laid in the indictment, for they are all made essential to the identity. And if the jury find that the indictment charges or alleges the name of the defendant to be Henry Evans *alias* Henry Rounsiville, then the name of Henry Rounsiville is an unnecessary particular description and must be proved as laid in the indictment, and if the name has not been so proven, then they cannot convict the defendant on any charge contained in the indictment." This charge the court refused to give, and the defendant excepted. The jury found the defendant guilty of murder in the second degree, and assessed his punishment at imprisonment in the penitentiary for thirty-nine years. The defendant appeals to this court, and assigns the various ruling to which exception were reserved as error.

ROBINSON & BROWN, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

No briefs came to Reporter's hands.

MANNING, J.—It is settled law in this court, that the decision of a Circuit Court refusing a change of venue in a criminal cause is not subject to revision here.—*Kelly v. The State*, 52 Ala. 361.

After pleading not guilty to an indictment for murder, which was in no respect insufficient, and taking part in empanneling a jury sworn to try him, and examination has been had of the witnesses, it is too late for a defendant to object that the copy of the indictment which had been delivered to him was incorrect; at least, unless it be made manifest that the defendant had thereby been put to a disadvantage which would probably lead to an unjust verdict against him. In this instance, this does not appear. The same evidence that would be required to convict the defendant upon the first count in the indictment which was left out of the copy that was served upon him, would be sufficient for his conviction of the same offense, in nature and degree, under the second count, of which a copy was duly delivered to him. Doubtless, if it should be made to appear that defendant had been taken by surprise, and failed to obtain important evidence on his behalf, or had otherwise been misled to his injury—by the service upon him of a copy materially

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variant from the true indictment—it would avail him on a motion for a new trial in the Circuit Court.

The testimony of Pace was not so irrelevant as to be inadmissible on the part of the State. It was a narration of some remarks made by defendant in a company composed of himself and Foster (the deceased), and one or two others “a short while before the killing.” But the State failed to elicit any expression therein of malevolence on the part of defendant towards Foster. The evidence was more in appellant’s favor than against him, and could not have done him any injury on the trial.

Foster was killed in February, 1877. Between two and three years before, according to the testimony of Freeman, Foster and his wife having rode up to a church, near which witness and defendant were standing, the latter said to Foster: “There is a man I cannot get along with.” This remark by itself was entitled to very little weight, in comparison with other evidence in the cause. But we cannot say that it was not “legal or lawful evidence;” which was the reason assigned for objecting to it. It was relevant, and therefore admissible.

It was proved that on the morning of the day of the homicide, defendant borrowed a “Joseph Rodgers’ knife,” having a single blade about four inches long, from a neighbor, saying, “I may need it.” He was then starting on horseback to town, on return from which, on the night of the same day, the homicide was committed. After the three other persons in the company had started he overtook them and furnished money with which a bottle of whisky was bought, of which three out of the four (himself, Foster and another) drank until some, if not all of them, were intoxicated. Defendant, after the drinking, rode along with Foster, whose brother Jack he soon began to abuse. This ended in Foster’s saying Jack was his brother and he would defend him. Whereupon they both got down, Foster being unarmed, and fought a short time in the dark. Foster died almost immediately, having received five wounds made by a knife, which was not found. Defendant was bruised and his ankle sprained. We do not think that in explaining the inference—not of malice aforethought—but of an *intent to kill*, as arising from the nature of the weapon used by one person in slaying another, the circuit judge made his charge obnoxious to the criticism of singling out a part of the facts, and thereupon giving to them too much emphasis in his instruction to the jury. What he said on that subject was only a part of his charge. He explained to them at the same time the law of manslaughter, and of killing in self-defense, or of supposed self-

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defense. And we do not perceive in his charge on these subjects, any unfairness or error.—See *Hadley v. The State*, 55 Ala. 31; *Commander v. The State* (in MS.); Murphy's case, 39 Ala. 142; Eiland's case, 52 Ala. 322; Clark's Manual, § 529.

The first charge asked on behalf of defendant, manifestly, was properly refused. Such an interpretation of the juror's oath as is therein assumed, would always arm those members of a jury who might be in favor of a verdict of acquittal, or of finding the defendant guilty of an inferior grade of the offense for which he was indicted, with authority to coerce the rest into a concurrence with themselves. The oath binds each juror, severally, a *true* verdict to render, according to the evidence, upon his own judgment and conscience, not those of his fellows.

The fact that defendant was designated in the indictment as "Henry Evans, *alias* Henry Rounsiville," did not make it necessary to prove that he was known and called by both of these names. It was sufficient if he was identified as the person entitled to either of them and known by it.

We find no error in the record, and the judgment must be affirmed.

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Indictment for Living in Adultery.

1. *Witness; who incompetent.*—The husband of a woman, jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them on their trial for that offense.

APPEAL from Barbour Circuit Court.

Tried before HON. HENRY D. CLAYTON.

The appellant, Bob Cotton, was convicted of living in adultery with one Martha Cox, who was jointly indicted and tried with him. On the trial the court permitted the husband of said Martha to testify against him as a witness for the State, against the objection and exception of the appellant, and this ruling is now assigned as error.

JOHN A. FOSTER, for appellant.—The husband of a woman, jointly indicted with her paramour for living in adultery, is an incompetent witness against either on a trial for the

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offense.—See 2 Brewster, 569; 32 Miss. 405; 1 Gray 555; 1 Greenl. Ev. § 334-5; 13 Shep. 30; 11 Mass. 441.

H. C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—The common law excluded the husband and wife as a witness in any case, civil or criminal, in which either was a party. The principle of the rule required its application to all cases in which the interests of husband or wife were involved. Therefore, “the wife is not a competent witness against any co-defendant, tried with her husband, if the testimony concern the husband, though it be not directly given against him.”—1 Green. Ev. §§ 334-35. The reason for the exclusion is founded partly on the identity of interest and partly on considerations of public policy, “which lie at the basis of civil society.” The statute removing interest as a cause of excluding witnesses, and rendering parties competent, is, by its terms, confined to suits and proceedings *other than criminal cases*.—Code of 1876, § 3053. In *State v. Welsh*, 13 Shep. (26 Me.) 30, it was held, that on the trial of an indictment against a man for the crime of adultery the husband of the woman, with whom the crime is alleged to have been committed, is not a competent witness to prove the act of adultery. The court say: “If there is soundness in the reason, which is given in the books, for holding incompetent the husband or the wife to give, against each other, evidence, because it may be the “means of implacable discord and dissension between them,” it is certainly difficult to perceive how that discord and dissension will fail to arise, when, in collateral proceedings, testimony should be given by one which charges directly upon the other the same crime, for the commission of which the party on trial is indicted.” It was said by PARKER, C. J., in *Canton v. Bentley*, 11 Mass. 441: “It may well be doubted whether a husband can be a competent witness to prove a fact, which amounts to adultery on the part of the wife; and it would certainly be against good manners and common decency that such evidence should be admitted.”

The wife and her accomplice in guilt were jointly indicted and tried. The husband was surely incompetent to testify against the wife, and was also incompetent to testify against her accomplice.

The judgment must be reversed and the cause remanded, the appellants remaining in custody until discharged by due course of law.

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Bill in Equity to Settle Administration.

1. *Jurisdiction of Chancery to instruct and direct trustee.*—The limits and extent of the jurisdiction of Chancery to instruct and direct one standing in a fiduciary relation, in the execution of his trust, and the circumstances and class of cases in which the fiduciary can invoke its aid and direction, have not been clearly defined.

2. *Same.*—The most common instances of the exercise of the jurisdiction, are where it has become important to avoid responsibility on the part of the executor, trustee, &c., to have a deed or will, of doubtful meaning or effect, construed; or where doubts or disputes have arisen concerning the shares of an estate or fund to be distributed, to which the beneficiaries, whether legatees, distributees or creditors, are respectively entitled; and in some cases (though since the enactment of our statutes regarding the settlements of insolvent estates of decedents, such a bill can rarely be necessary,) to restrain creditors or legatees from prosecuting suits against the personal representative, and compelling them to bring their claims into the Court of Chancery for settlement there, when the assets can not readily be got in, and it is uncertain whether he can safely omit to plead that he had fully administered, or *plene administravit prae*ter, a sum required to pay preferred debts.

3. *Same; what not within.*—This jurisdiction can not be so perverted as to allow an administrator, on bill seeking the advice and direction of the court, to place it in the relation of his general legal adviser, as to the validity of claims, or the bringing of suits against persons, who in separate transactions with the deceased, or with the administrators of his estate, may have come under liability to a subsequent administrator; nor can the court be called on to decide in this way, the right between the administrator and those who, claiming title, refuse to give up property on his adverse demand, or to determine a liability to him of a third person, in no way interested in the distribution of the estate, asserted on the one side and denied on the other.

4. *Bill in Chancery; what multifarious.*—The fact that the bill is filed to obtain the advice and direction of the court, will not authorize the joining in the same bills defendants against whom relief is sought, as to several and independent transactions, with which many of them have no necessary connection or interest; the reason of the rule against multifariousness, applies as strongly to a bill of this kind as to any other.

5. *Declaration of insolvency; effect of.*—A declaration of insolvency of an estate by the Probate Court, upon an administrator's report of its insolvency, does not *ipso facto* terminate his authority; and if he continues to administer the estate afterwards, the creditors not having elected or the court appointed another in his stead, his acts are valid, and the sureties on his official bond remain bound, as much so as if the estate had not been declared insolvent.

APPEAL from Madison Chancery Court.

Heard before Hon. H. C. SPEAKE.

The facts are thus stated by Mr. Justice MANNING:

Complainant, Clay, being recently appointed successor to an administrator *de bonis non* of the estate of Clement N. Vincent, deceased, by the Court of Probate of Madison county, filed the present bill, May 6, 1877, against the adminis-

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trators in chief, and the former administrator *de bonis non*, Frank B. Gurley and his sureties, and against purchasers of land of the estate, at sales thereof supposed to be invalid, made by Gurley as administrator, and against subpurchasers from his vendees, and against the heirs and distributees of Vincent, and against the creditors of his estate, the defendants in all exceeding over sixty in number.

According to the bill of complaint, Clement N. Vincent died in 1865 intestate, and leaving a considerable estate. The administrators in chief of it, during their short administration, only effected a partition of certain parcels of land belonging to the estate of said Clement N. and one Ann Vincent, whereby there was allotted by the commissioners, to the estate, the northeast, southeast and southwest quarters of section 33, in township three, &c., which is the land that was to be divided,—although in the order appointing the commissioners and directing the division, the land was described as the same three quarters of section 3 (three) in township 3, &c., while the application filed for the partition could not now be found. The division was confirmed by the Probate Court as made by the commissioners. In August, 1866, the administrators in chief resigned, and they have since filed their accounts in the Probate Court, showing no assets received by them, for a settlement of their administration. It is not shown that there had been any claim set up on the part of said Ann Vincent to the lands so allotted in severalty to the estate of said Clement, or that she has refused to convey or relinquish her interest therein.

Passing from that subject, the bill then alleges the appointment of Frank B. Gurley as administrator *de bonis non* of said estate, on the first day of January, 1867; that in October following he filed a petition for the sale of lands belonging to it, and described in the petition, the hearing of which petition was set by the Probate Court for the 16th of December following; that on the 17th of December he filed a report of the insolvency of said estate, with schedules of debts and property thereof, for the hearing and decision of which the 17th day of January, 1868, was appointed; that on the 19th of the previous month, December, 1867, action was had on the petition, and a decree made authorizing Gurley to sell said lands—upon the terms that one-third of the price be paid in cash and the residue in two equal installments, one and two years afterwards; but that the records of the Probate Court do not show a continuance of the proceeding upon the petition from the 16th to the 19th of December; that on the 17th of January, 1868, the same court acted upon the report of insolvency and declared the estate insolvent;

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that thereafter the said Gurley “pretended to act as administrator of said *insolvent* estate, but without any order of said Court of Probate appointing him such or continuing him administrator thereof * * * * * [and] without qualifying or giving bond as such pretended administrator”; that so acting, he made and reported sales under the decree aforesaid, of lands of the estate which had been confirmed by the court, March 21, 1868, to divers persons, severally, who are made defendants in this cause, and who made the first payment of one-third of the price in cash, and gave their notes for the deferred installments; that some of these notes had been paid,—whereupon, and under an order of the court, said Gurley, as administrator, made deeds to such as had paid in full; that afterwards, in December, 1874, still acting as such pretended administrator of the insolvent estate, he applied for and subsequently obtained an order of the Probate Court for the sale of other lands of the estate to pay debts, and sold and reported the sale thereof in June, 1875,—which sale was confirmed, and on the payment being made, a deed was executed thereof under an order of the court to the purchaser; that said Gurley has “never filed his account and vouchers for a final settlement of his administration *de bonis non* of the solvent estate of said Clement N., deceased, until the 22d of July, 1871, and said Court of Probate never made any order continuing him as administrator of said *insolvent* estate,” and said settlement is still pending and undecided; and that having failed to execute a new bond, as required by the Probate Court, Gurley was, on the 10th of March, 1877, removed from the office of administrator; and on the 17th of the same month the plaintiff in this bill was appointed by the court administrator *de bonis non* of said insolvent estate. In support of these allegations, a large number of the orders of the Probate Court, and petitions and reports to it, are copied and set out at full length, and a certified transcript of the entire record of the Probate Court is also appended to the bill as an exhibit.

The bill then, through a number of pages more, sets forth “a list of the creditors who have presented claims against the estate of said Clement N. Vincent, deceased, together with a description of their claims,” amounting to a large number, and these claims are again set out at length in the exhibit to the bill.

Plaintiff then further alleges that Gurley, the administrator, and his sureties, are insolvent; that Gurley has wasted and misapplied the moneys he has received by the sales, and is unable to pay any part of the same; that he did not receive all of the purchase money for the lands sold, and

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orator does not know how much he has received, and prays a discovery thereof by this bill; that Gurley made payment therefrom to some of the creditors without any order of the court, but how much and when orator does not know, and prays discovery. It is next alleged, "That many of the creditors of said estate claim that" certain sales of the land by Gurley are invalid, and as to them and orator as their representative, ought to be vacated and annulled, because the order for their sale was made "not at a regular or special term of the Court of Probate and on a day to which the proceeding for the sale had not been regularly continued, and because the day appointed for the hearing of the application for sale and the day the order of sale was made were both less than forty days subsequent * * * to the date upon which the order was made appointing the day for the hearing of said application; "that many of the creditors of said estate claim" that the sale of a certain parcel of land to defendant Sublet, is invalid and should be annulled, as to them and orator, "because the land as sold was neither described in the petition nor embraced in the order of sale;" and of some other parcels they say that they were sold without any petition or order therefor; and "that many of the creditors * * claim that all the sales made by Gurley should be set aside—because no proceeding for the sale thereof was instituted * * * *after the decree of insolvency,*" and because he was not authorized to sell them by an order made after the decree of insolvency, and was not appointed or qualified as administrator of the insolvent estate.

The bill further alleges that the sureties of Gurley deny their liability for sales made by him after the estate was declared insolvent; and that said Gurley now proposes, in his account as filed, to charge himself with the moneys received from certain purchasers of the lands; while the creditors, on the other hand, contend that in his final settlement the court should not charge him therewith, because they say that for the reasons stated, the sales were null and void and the lands still belong to the estate, and that he and the purchasers are chargeable with rents for the use and occupation of the same.

It is further alleged, that the first administrators have filed their account, of which a copy is made an exhibit, wherein they charge themselves with no assets and claim to be creditors for expenses of their administration, and fees for their services as their own attorneys, in respect of which account nothing has been done by the Probate Court; that Gurley filed a bill against one of the purchasers of land, Isabella M.

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Bradley and her husband Joseph C. Bradley, "for the alleged purpose" of enforcing the vendor's lien for balance of purchase money due, and in January, 1877, obtained a decree, which is copied into the bill, for a sale of the land to pay a sum of \$680 11-100 as that balance; that in March, 1876, said Isabella and her husband conveyed said lands, (for which she had bid \$5,960,) to pay debts, to certain persons, her creditors, by a deed absolute on its face, but which plaintiff, on information and belief, alleges was intended to be and is a mortgage to such persons, who, to a number between fifteen and twenty, are made defendants to this bill; and that said Isabella claims to be owner of the lands so conveyed, subject to the incumbrance created by said deed.

Whereupon plaintiff says he "is embarrassed by grave doubts as to the proper discharge of his duties as administrator of said insolvent estate, and is advised that he can not, without the instruction and direction of the court in the conduct of his administration, avoid the hazard of serious personal responsibility;" that he is especially in doubt as to his duty touching the settlement of Gurley's administration accounts, involving the discharge of his sureties for his acts since the decree of insolvency, "if performed without authority of law, and involving multiplicity of suits," if plaintiff should elect to treat his acts as void—and the danger of being barred by the statute of limitations, if he should elect to test the validity of said sales and the responsibility of the sureties, by one or more actions at law. "And among the questions of doubt and difficulty (plaintiff says further) is that concerning what he should do in reference to Gurley's suit and decree against Isabella Bradley for the purchase-money of the lands sold to her."

Moreover, no assets have come into plaintiff's hands to pay expenses of litigation, and if the sales of the lands are to be treated as valid, he will not receive any assets except what may, perchance, be recovered from said Gurley and his sureties.

Wherefore, plaintiff prays that the Chancery Court will "take jurisdiction of the whole administration of the estate," and in all things direct and instruct him therein, and require the creditors to bring in their accounts and submit them to its jurisdiction, and to abide by and conform to its orders, and that it will determine whether the sales by Gurley are valid and binding on the estate, and if so only in part, which of them are so; and that as to such of the lands as were not validly sold, the court will by its decree remove the cloud upon the titles thereto occasioned by such sales, and render a decree against said Gurley and his sureties, and the pur-

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chasers of such lands, for rent for the use and occupation thereof, and bring Gurley to a final settlement of his administration in said Chancery Court, and render personal decrees against him and his sureties; and that the first administrators be required to settle their administration in said Court of Chancery, and that the purchasers of the lands not validly sold be compelled to deliver possession thereof to plaintiff, and that on such lands as were validly sold, the court decree a vendor's lien to plaintiff and decree a sale of the lands to pay the purchase-money, &c.

This is a very brief abstract of a very voluminous bill. Many grounds of demurrer are assigned by a number of the defendants, objecting especially that it is multifarious and contains no equity. The Chancellor sustained the demurrers; and plaintiff, declining to amend or modify the bill, prayed an appeal to this court.

HUMES & GORDON, for appellant.

D. P. LEWIS, *contra*.

MANNING, J.—The bill in this cause is founded on a misconception of the cases and circumstances in which a person occupying a fiduciary position is entitled to instructions and direction from a Court of Chancery in the performance of doubtful or not well defined duties. The extent and limits of its jurisdiction for this purpose, do not indeed seem to be clearly fixed. But it can not embrace a congeries of cases like this. More than sixty individuals, standing in various, and many of them in very different relations toward the estate of decedent, Vincent, are sought by a second administrator *de bonis non* thereof, to be made defendants to this bill of complaint; and the separate matters it refers to are sufficient for, perhaps, a half dozen or more independent suits, in no one of which would more than a few of the persons thus brought together have any interest.

A court of equity does not take the place of counsel to act as general legal adviser to an administrator, in regard to the validity of claims, or the bringing or not bringing of suits, against the various persons who in separate transactions with the deceased in his life time, or with administrators of his estate afterwards, may be supposed to have come under liability to a subsequent administrator *de bonis non* thereof. Nor do we know of any authority or principle which would permit the administrator, by a recital of such distinct matters in one bill, and by averments, if made in due form, thereupon, to assemble together the numerous individuals,

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who might be separately concerned therein, some in one transaction and some in another, as co-defendants, whether with or without the creditors of the estate, to controvert jointly in that single cause, the claims and charges, and to hear and obey the several and different decrees to be made against them or any of them therein. This bill requires an answer to every paragraph in it, from each of the defendants, and prays for such various decrees; and it is only by means of them that the conclusive judicial instructions and direction sought could be given. Yet very clearly, those who are the proper defendants to a suit of which a single independent transaction is the whole subject, have the right to insist that the litigation concerning it shall not be complicated in the same cause, with that concerning some other distinct ground of controversy in which they are not, and other persons only are interested.

What have the first administrators of this estate, whose account for a final settlement has been filed in the Court of Probate, to do with sales of the lands of the estate which a subsequent administrator *de bonis non*, made, or undertook to make, to third persons? Why should the settlement of that account, to which no objections have been filed, and the discharge of those administrators, be hindered by being involved in a suit against others, which, if maintainable, could not probably be determined in several years? The Chancery Courts are in session in each district, only during two short terms a year. Why should a contention between the plaintiff and the purchaser of one parcel of land, in regard to a vendor's lien thereon for a residue of the purchase money, be joined with and delayed by a dispute with the purchaser of another parcel, who had paid for the same and with his vendees, in regard to the validity of his or their purchase? All such complications are clearly in violation of the rules which prohibit misjoinders of parties and of causes of action, and are intended to prevent what is called multifariousness.

It is true that a case may often seem multifarious, when it is only complex; and it is not always easy to discern the line by which the latter is to be distinguished from the former. Counsel for appellant refer to *Allen et al. v. Montgomery R. R. Co.* (11 Ala. 437), as an authority for the present bill. In that case, judgment creditors of the railroad company were suing to obtain payment of their judgments by proceedings against its stockholders, for their unpaid shares of stock, and against its vendee for the proceeds of property alleged to have been fraudulently conveyed by the company to him. There the right of plaintiffs against the stockhold-

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ers and alleged fraudulent vendee, could be traced and asserted only through the supposed fraudulent judgment-debtor, the company, and their connection and dealing with it. The common *nexus* was through this judgment debtor, itself a defendant with whom the other defendants were supposed to be collusively confederated. They were proceeded against only to subject assets of this debtor, alleged to be in their hands, to the payment of its just debts. As to the defendants other than the company, the proceedings were somewhat in the nature of a garnishment upon a judgment, whereon branch suits may be engrafted against those indebted to or having effects of an insolvent judgment debtor. Even in a court of law, by such process upon a judgment therein, "any number of persons, whether they hold property, or are indebted jointly or severally to the debtor," may be brought in to answer severally, in respect of their liability to him, to his judgment creditor.—*Curry v. Woodward*, 50 Ala. 258.

The present case is quite a different one. Plaintiff's complaint is based upon supposed separate and distinct liabilities of others directly to himself. True, he stands in the representative character of an administrator. But as such, and against them, he is clothed with all the legal and equitable title that the intestate, if living, could have had in the property and choses in action of the estate, and upon that title may sue at law, or in equity, as independently of creditors, distributees or other beneficiaries, as if he were absolute owner.

The cases in which a trustee, executor or administrator has usually invoked and received the instructions and direction of a court of equity, are those in which it has become important, in order to avoid responsibility, to have a deed or will, or other writing of doubtful meaning or effect, construed; or where disputes or doubts have arisen in respect to the shares of an estate or fund ready to be distributed, to which the beneficiaries, whether legatees, distributees or creditors, were respectively entitled. In such cases, those who are interested in the instrument to be construed, or claim portions of the fund or estate to be divided, are sometimes brought into a court of equity, to prevent a race of diligence at law, and being heard upon questions arising between themselves, the Chancellor decides them, and gives directions and pronounces judgment accordingly. But it is not in any such *quasi* consultative proceeding that questions of right are decided, between those who, claiming title, refuse to give up property upon an administrator's adverse demand of the same, or in which a liability to him of a third person,

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in no way interested in the distribution of the estate, is asserted on one side and denied on the other. Such antagonism makes necessary a contestation at law or in equity, between them and them only. And the suit in which it is waged must be conducted in the ordinary manner, with averments in the pleadings that properly present the issues to be determined. Several of the matters mentioned in the present bill, are of a nature requiring this direct litigation *inter partes*, if plaintiff shall find and be advised, after due investigation, that he ought to contend for them. And his need of advice cannot constitute a reason why those against whom he may have, or may suppose he has just claims, shall be denied the right of having them tried according to the rules of law.—*Weakley v. Hammond*, (last term).

Courts of equity have also sometimes interposed to restrain the creditors or legatees of an estate from prosecuting suits against the administrator, and to require them to bring their claims into such courts for settlement there, when the assets could not readily be got in, and it was uncertain whether he could safely omit to plead that he had fully administered, or *plene administravit præter*, a sum required to pay preferred debts.—*Jeter v. Barnard & Co.*, 42 Geo. 43; *Irvin v. Creditors of Bond*, 41 Geo. 630. See, also, *Buckle v. Atleo*, 2 Vern. 37; *Rush v. Higgs*, 4 Vesey, 638, and Sumner's note; 1 Story's Eq. Jur. § 544; *Lee v. Park*, 1 Keene, 715.

But this is not the object of the bill in this cause; nor is any occasion shown for a bill to restrain creditors. Indeed, it can rarely now be necessary in this State to file one for such a purpose. By our statute law, provision is made for declaring the estate of a deceased person insolvent, when it is reported and shown to be so, in the Probate Court, and for requiring the creditors to file their claims and come to a settlement with the administrator and one another there. And though, to determine the question of liability or not of the estate or the amount of its liability, suits be prosecuted against the administrator in other courts, the law requires that if judgments be rendered therein against him, they shall nevertheless be certified without execution, to the Probate Court for their due proportions of the assets, when the estate has been declared insolvent. These enactments greatly facilitate settlements, and render it generally unnecessary, when trusts proper or some other matter of exclusive equity jurisdiction are not involved, to subject an estate to the expensive and dilatory administration of a court of equity. And this an administrator is not permitted to do in this State without showing such special circumstances as shall justify

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the interposition of that court.—*McNeil's Ex'r v. McNeil's Distributees*, 36 Ala. 109.

In our opinion the bill in this cause does not present a case of that kind.

There is one question concerning property rights, that has been discussed in this cause upon which we ought probably, in order to avoid future litigation, to express our judgment. It arises thus: Gurley, administrator *de bonis non*, reported the estate of his intestate, Vincent, insolvent, and it was so declared to be by the Probate Court. But no appointment of a successor to him was made by that court, either upon a nomination of the creditors of the estate, or otherwise; nor was Gurley reappointed to be administrator of the estate as an insolvent estate; nor did he execute any new bond for the office. And it is alleged that doubts exist whether the sureties upon the bond he gave, are liable for any acts or defaults of his, after the estate was declared insolvent, and whether his right to the office was not thereby absolutely determined, and his subsequent acts of administration void.

We think there is no reason for such doubts. The statute enacts that the Probate Court shall require the administrator of an estate, when it is declared insolvent, within sixty days therefrom, to appear and make a settlement of his accounts."—Code 1876, § 2559 (2187); and that then, or on some other day to which the settlement may be continued, the creditors "may nominate any fit person * * * as administrator of the property, and of the rights and credits thereof unadministered," (§ 2561); which person shall be appointed by the court— (§ 2564). But if the creditors do not attend, "or if from any other cause, no appointment of such administrator is made, the court may, in its discretion, continue the former executor or administrator," &c. (§ 2566); and "whenever any administrator is *appointed* under the provisions of this law," any former grant of letters on the estate is *thereby* revoked," &c.— (§ 2567.)

These provisions ought, of course, to be observed by the Probate Courts; but they are only directory. Until revoked as thereby provided, the letters of administration continue in force, and the authority and powers they confer may be exercised. The sales of land made by Gurley after the declaration of insolvency, under an order of the Probate Court made before, and those he made afterwards upon petitions and orders of sale which were also made after that time, when reported to the court and confirmed by it, are not invalid because the administrator who made them was not re-appointed after the declaration of insolvency.

The idea is fallacious, that by a bill like the one before

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us, the various controversies with third persons, in which the estate of a decedent may be concerned, can be conducted and concluded more expeditiously and cheaply than by several separate suits. The costs of a chancery cause are largely proportionate to the number of the defendants. Each of these, unlike plaintiffs, must be served with process and notices, and may be entitled to a copy of the bill; and when the bill is made very voluminous by the incorporation in it of various matters and recitals that in no way concern most of the defendants, the expense of the copies is enormously and unnecessarily increased. Moreover, a suit like this, if maintainable, being commenced as one, must be continued as one to the conclusion. It can not be split up into several parts, some of which may be in an appellate court, while others may remain in the Court of Chancery.—*Moore v. Randolph*, 52 Ala. 530. Consequently it will often happen, also, that the entire cause must be continued and delayed, perhaps term after term, because of the failure to get necessary evidence concerning—or of the death of a defendant concerned in—one of the subjects of controversy, while in respect of others every thing and every body may be ready for the decree of the court. Greatly increased delay and expense would be the usual, often the inevitable, consequences of so combining different causes of action in one suit.

Let the decree of the Chancellor sustaining the demurrers be affirmed.

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Bill in Equity to Declare and Enforce Lien.

1. *Payment; who must prove.*—A party relying on or pleading payment must prove it. It is a defense peculiarly within his knowledge, and though his adversary in pleading may negative it, the negative averment is taken as true until he disproves it.

2. *Note for purchase money; right of transferee of.*—Where a note is given for the purchase money of land, the vendor retaining title as security for its payment, all the essential incidents of a mortgage attach and a transfer of the debt for the purchase money passes an equitable right to the assignee, whether the vendor is liable to him or not, to charge the lands with its payment.

APPEAL from Pike Chancery Court.

Heard before Hon. H. AUSTILL.

The opinion state the facts.

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JOHN D. GARDNER, for appellant.

W. D. WOOD, *contra*.

BRICKELL, C. J.—The bill is filed by the appellant, as the assignee of a promissory note made by the appellee Nall, for the purchase-money of lands described in the bill. Title to the lands had not been made by the vendor; by bond or covenant, he had stipulated to convey on the payment of the purchase-money. The appellant claimed title to the note under a purchase and transfer from a receiver or trustee appointed by a court of chancery to take charge and dispose of the assets of the vendor. The bill avers the note is due and unpaid; and the answer of the vendee denies the averment, setting up that the note had been paid, and the manner of its payment, but of the fact, there was no evidence given.

Two questions were argued by counsel, and to them we confine our opinion:

First—Was it incumbent on the appellant, in the state of the pleadings, to offer evidence of the non-payment of the note? There can be no doubt this question must be answered negatively. A party pleading or relying on payment must prove it. The fact lies peculiarly within his knowledge, and though his adversary in pleading may negative it, the negative averment is taken as true until disproved.—1 Green. Ev. § 79; *Carroll v. Malone*, 28 Ala. 526.

Second—Whether the appellant, acquiring title to the note by a transfer not involving the vendor in liability, can charge the lands with its payment? When the vendor of lands, as in the present case, retains the legal title as a security for the payment of the purchase-money, all the essential incidents of a mortgage attach, and a transfer of the debt for the purchase-money passes an equitable right to the assignee, (whether the vendor is or not liable to him,) to charge the lands with its payment.—*Bankhead v. Owen*, 60 Ala. 457. If the vendor had conveyed the lands, a different rule might obtain.—*Hightower v. Rigsby*, 56 Ala. 126. Under the pleadings and proofs, the appellant was entitled to a decree declaring and enforcing a lien on the lands for the payment of the note described in the bill.

The decree of the Chancellor must be reversed, and the cause will be remanded that a decree may be entered in conformity with this opinion.

[Lucas v. State.]

Lucas v. State.

Indictment for Grand Larceny.

1. *Larceny; what necessary to sustain conviction in county other than that in which offense was committed.*—To authorize the conviction of a thief for larceny, in a county other than that in which the offense was committed, he must have had control, actual or constructive, of the stolen property in such county.

2. *Same.*—Where a horse is stolen in one county, and the thief sells and delivers possession to another person, and the two go to another county, where the purchaser takes the horse, that the thief may there receive the balance of the price, the thief cannot be convicted of larceny in the latter county; but where the thief and another party merely exchange horses, to be re-exchanged at pleasure, and the two ride into another county, the thief may be there convicted of the larceny; for in the latter event the person making the exchange would be but the agent or instrument of the thief in bringing the stolen property into the county.

APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

The appellant, Matt Lucas, was convicted of the larceny of a horse. One Jones, a witness for the State, testified that he was in Rockford, Coosa county, Alabama, and early in the morning saw the defendant ride into that place on a fine mare; that he suspected the horse was stolen, and he asked defendant where he was going, to which defendant replied that he was going to Col. Glidden's Iron Works in Talladega county. Witness remarked that they could go together to Talladega, and in company with one Watt he and defendant left Rockford. After riding along for some time, witness remarked to defendant that he would like to own the mare he was riding, to which he replied that he would sell her, and after some conversation, witness offered to give defendant sixty dollars for the mare when they got to Talladega. This proposition the defendant accepted. At Stewartville, in Coosa county, witness and defendant exchanged horses, and after they had passed Hightower's Tan Yard, in Talladega county, witness proposed to defendant to give him a watch which he was wearing and ten dollars when they got to Talladega for the mare. The defendant agreed to this, and witness turned over the watch to him, and they rode on to Talladega, from which point witness telegraphed to the Chief of Police of Montgomery as to the character of defendant, and received an answer that he was a noted horse thief. It was agreed that Watt, if present, would swear that Jones and

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defendant traded for the horse at Stewartville, in Coosa county, and that Jones gave the defendant then and there a watch, in part payment for the mare, promising to pay the balance due when the defendant and Jones arrived at Talladega, and that the defendant then and there turned over the horse to Jones, while they were in Coosa county. There was evidence tending to show that the horse had been stolen from one Goodwin, in Elmore county. This was, in substance, all the evidence. The court charged the jury, "If, before witness, Jones, and the defendant got into Talladega county, even though Jones may have bargained with defendant for the mare, to be paid in Talladega, and exchanged horses with defendant in Coosa county, if it was not understood as a delivery to Jones under this contract, and Jones had ridden the mare into Talladega county, and may have determined in his own mind not to let defendant get possession of the mare until such time as he could find out whether the mare was stolen, if the defendant came willingly into Talladega county, on his route to Glidden's Iron Works, and for the purpose of getting pay for the mare of Jones in Talladega, claiming her as his property, if he stole the mare in Elmore county, from Goodwin, then he is liable to be prosecuted in this county," and the defendant excepted. The defendant then asked the following written charges: 1. "If the jury believe from the evidence, that Jones took possession of the mare in Coosa county, with the intention of keeping it until he (Jones) could ascertain whether or not it was stolen, then they should not find the defendant guilty of bringing stolen property into Talladega county, unless they should further see from the evidence that the defendant has had the horse in his possession in Talladega county." 2. "If the jury believe from the evidence that the defendant turned over the possession of the mare alleged to have been stolen, to Mr. Jones, at or near Stewartville, in Coosa county, and that the defendant has not had the mare in his possession since he delivered it to Jones at or near Stewartville, in Coosa county, they should acquit the defendant." 3. "If the jury believe from the evidence that, at or near Stewartville, in Coosa county, Mr. Jones traded with the defendant for the mare, and delivered to the defendant (as part of the subject matter of said trade) a watch, and that then and there defendant parted with the custody and control of said mare to Jones, then they should acquit the defendant." 4. "If Jones took actual custody of the mare in Coosa county, and the defendant has had no control or custody of said mare since Jones took possession of it in Coosa county, then they must acquit the defendant." The court refused to give

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each of these charges, and the defendant separately excepted.

F. W. BOWDON, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The controlling inquiry in this case, as presented by the record, is, the county in which the trade was made. One witness testifies it took place in Talladega county, the other in Coosa. This raised a question for decision by the jury. If the trade was made in Coosa, and Jones took possession of the horse, under the trade, in that county, then the horse was under his control, although it was agreed the defendant should accompany him to the town of Talladega, to be there paid the residue of the purchase price. On the other hand, if only a temporary exchange of horses took place in Coosa county, each riding the other's horse, to be re-exchanged at pleasure, and in this condition they entered Talladega county, then Lucas, the defendant, can be convicted, if the charge be otherwise made out, although he may not have had the actual custody of the horse in Talladega county. In the case last supposed, Jones would be but the agent or instrument of Lucas in carrying the property into the county, and the guilty act would be properly chargeable to Lucas. Several of the rulings of the Circuit Court are not reconcilable with these views. We need not particularize.—1 Bish. Cr. Law, § 137, *et seq*.

Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

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Real Action in Nature of Ejectment.

1. *Title to land; what writing ineffectual to pass.*—An instrument of writing not attested by any subscribing witness, nor proved or acknowledged before a proper officer, is ineffectual to pass the legal title to land, and cannot be made the basis of recovery or defense in an action of ejectment.

APPEAL from Coosa Circuit Court.

Tried before Hon. JAMES E. COBB.

The opinion states the facts.

LEWIS E. PARSONS, JR., for appellant.

[Smith v. The State.]

JESSE S. EDWARDS, *contra*.

MANNING, J.—This was an action at law, brought by appellee, Glenn, to recover possession, from appellants, of a parcel of land. Plaintiff claimed title by an instrument in writing, purporting to be a mortgage of the property, to secure payment of a note of the mortgagor, one Robertson, for borrowed money. But the instrument was not attested by any subscribing witness, nor was the execution of it acknowledged by the mortgagor. It was, therefore, according to the statute, not effectual to transfer the legal title to the mortgagee. Though evidence of the contract which the parties to it made, and available in a court of chancery, if Robertson was owner of the land, the writing did not operate to convey the land so as to enable the plaintiff to maintain an action to recover it in a court of law.—Code of 1876, § 2145; *Hendon v. White*, 52 Ala. 597; *Harrison v. Simons*, 55 Ala. 510.

The judgment of the Circuit Court must be reversed, and the cause be remanded.

Smith v. State.

Indictment for Using Vulgar Language.

1. *Different offenses; what indictments charge prima facie.*—*Prima facie*, an indictment against James Henry Smith for uttering vulgar language in the dwelling house of John S. Turner, charges a distinct offense from that set forth in an indictment against Henry Smith for uttering such language in the dwelling house of Sarah Holly; and where the former indictment and proceedings thereon are relied on to prevent the defense of the statute of limitations against the last indictment, it must be shown that the same offense and offender were charged in both indictments, and this may be done by parol.

2. *Entries; what not admissible evidence, of a nolle pros.*—An entry on the docket of the presiding judge, not shown to be in his own hand-writing, is not admissible evidence to show that an indictment had been *nolle pros'd*, and the defendant held to answer, &c.; such entry is in no sense a record, though it would furnish sufficient basis for making a record of the proceedings.

APPEAL from Cleburne Circuit Court.

Tried before Hon. WILLIAM L. WHITLOCK.

The appellant, under the name of James Henry Smith, was indicted at the Spring term, 1878, of the Circuit Court of Cleburne county, for using vulgar and abusive language in the house of John S. Turner, and in the presence of females. On the trial, the State offered evidence tending to show that the appellant had, about the middle of November, 1875, made

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use of vulgar language as charged in the indictment, and that the house was then occupied by said John S. Turner, and one Sarah Holly, jointly. The defendant having introduced testimony in rebuttal, asked the court to instruct the jury, "That it devolved on the State to show, beyond all reasonable doubt, that the offense was committed by the defendant within twelve months before the finding of the indictment in this case," when the State solicitor, in order to avoid the question of the statute of limitations, as raised by this charge, offered in evidence an indictment found at the Fall term, 1876, which charged that Henry Smith entered the dwelling-house of Sarah Holly, and in the presence of the family, &c., made use of vulgar language, &c. The defendant objected to the introduction of this indictment, on the ground that it charged a different and distinct offense from that charged in the indictment on which the defendant was put on trial, and was illegal and irrelevant, but the court overruled his objections, admitted the indictment, and defendant excepted. The State then offered the following entries on the judge's docket, ordering a *nolle prosequi* of the indictment so offered: "Indictment quashed." "Defendant held over to answer a new indictment in the sum of one hundred dollars." No other judgment had been entered. The defendant objected to the admission of these entries, on the ground "that no judgment had been entered quashing the indictment, and holding defendant over to answer a new indictment, and that the entries made on the judge's docket were not such entries of record as could or would arrest the statute of limitations." The court overruled the objections, and admitted the entries, and the defendant excepted. The defendant again requested in writing the charge set out above, which the court refused to give, and he excepted.

GEO. W. PARSONS, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—It is urged in favor of the ruling of the Circuit Court that the case of *Foster v. The State*, 38 Ala. 425, settles the questions presented by this record adversely to appellant. We do not think the cases entirely analogous. In allowing the entries on the judge's docket to be read to the jury, we think the Circuit Court erred. The bill of exceptions does not inform us in whose hand-writing those entries were, nor by whom made. If it appeared that they were in the proper hand-writing of the presiding judge, they furnished sufficient authority for making a record of the pro-

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ceedings ; but they were in no sense a record.—1 Brick Dig. 78-9, §§ 137, 138, 139, 145, 147, 148, 153.

There is a discrepancy which should have been explained. The first indictment was against Henry Smith, and charged that he uttered the offensive language in the dwelling house, &c., of Sarah Holly. The second indictment is against James Henry Smith, and described the place as the dwelling house of John S. Turner. *Prima facie*, these are two distinct offenses, and the prosecution of one could not prevent the running of the statute against the other. If the offense was one, and the offender the same, this should have been shown. The witnesses could have explained it.—*Thomason v. Odum*, 31 Ala. 108; *Evans v. Billingsley*, 32 Ala. 392; *Davidson v. Shipman*, 6 Ala. 27; *State v. Matthews*, 9 Por. 370; 1 Brick. Dig. 860, §§ 799, 800; *Blackburn v. Winter*, 22 Ala. 613; *Young v. Fuller*, 29 Ala. 464.

Reversed and remanded. Let the defendant remain in custody until discharged by due course of law.

Lehman Bros. v. Bradley et al.

Bill in Equity to Subject Lands descended to Heirs to Debt of Ancestor.

1. *Heir, what not evidence against in proceeding to subject land descended to payment of ancestor's debt.*—There is no such privity between the personal representative and the heir, as renders a judgment against the former evidence against the latter, in a proceeding to subject lands descended to them to the payment of a debt of their ancestor.

APPEAL from Pike Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill filed by the appellants, Lehman Brothers, against the appellees, Rhoda C. Bradley et al., and seeks to subject certain land now in possession of the appellees, who are heirs at law of one Craig, or the alienee's of the heirs, to the payment of a debt due by said Craig, to whom the lands formerly belonged, and who had died intestate without disposing of them. A judgment on this debt had been recovered against the administratrix of said Craig. A transcript of this judgment was the only evidence of the debt offered by the appellants. The Chancellor dismissed the bill, and his decree is now assigned as error.

[Horton et al. v. Beadle, Adm'r.]

JOHN D. GARDNER, for appellants.

W. D. WOOD, *contra*.

BRICKELL, C. J.—The bill is filed to subject lands descended to the payment of a debt of the intestate. The only evidence of the indebtedness was the transcript of a judgment against the personal representative. There is no privity between the personal representative and the heir, and a judgment against the former is no evidence against the latter in proceedings to subject lands descended.—*Darlington v. Borland*, 3 Port. 9; *Teague v. Corbitt*, 57 Ala. 529. The decree is affirmed.

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Amendment Nunc Pro Tunc.

1. *Amendment nunc pro tunc; what evidence necessary to support.*—After the expiration of the term at which judicial proceedings are had, an amendment *nunc pro tunc* of the minutes can only be made upon sufficient evidence from the records or dockets, or memoranda made under the authority of the judge presiding when they were made, showing that the proposed amendment should have been made then.

2. *Same; what evidence will not authorize.*—An amendment *nunc pro tunc* of a decree on a settlement of an administration, so as to show the due appointment of a guardian *ad litem* for minors, and his acceptance in writing and acting for the minors, can not be allowed after the expiration of the term at which the settlement is had, when the only evidence adduced in support of the motion is that of the presiding judge, who does not testify positively as to any record of the appointment or written acceptance; and that of the administrator, who does not testify to the existence of the order of appointment or written acceptance thereof, or its loss, but only that a person who appeared at the settlement, was notified verbally by the judge, in the administrator's presence, that he was appointed guardian *ad litem*, and that such person appeared on the settlement and scrutinized the accounts. Such evidence does not prove the former existence or loss of any *memoranda* of record, showing the facts which it was proposed to insert in the amendment *nunc pro tunc*.

APPEAL from Madison Probate Court.

Tried before Hon. WM. RICHARDSON.

The opinion states the case.

L. P. WALKER, BRANDON & JONES, and CABANISS & WARD, for appellants.

HUMES & GORDON, *contra*.

[Horton et al. v. Beadle, Adm'r.]

MANNING, J.—Appellee was an administrator of an estate of which appellants were distributees. In August, 1866, when a settlement of the estate was made by the appellee in the Probate Court, the distributees, or some of them, were minors; and the decree then made declared that appellee had overpaid the distributees by more than \$11,000; which amount was thus ascertained to be due to him. About eleven years afterwards, appellee made the motion now brought here, that the judgment entry of this settlement and decree be amended *nunc pro tunc*, so as to show that the court had appointed a guardian *ad litem* to represent the minors on that settlement, and that they were duly represented by him. An amendment was made accordingly, by order of the Probate Court: from which an appeal was prayed to this court.

We can not concur in the view ingeniously presented by counsel for appellee, to the effect that it was proved by the latter that there was record evidence, which had disappeared, of the acceptance in writing by the guardian *ad litem* of his appointment, and that the amendment does not, therefore, appear to rest only upon oral evidence.

The witnesses were the person who was judge at the time of the settlement and appellee, who was administrator. The testimony of the former consists of impressions, inferences, and very indistinct recollections, so doubtful and vague as to be of no value, if admissible. Of appellee's evidence in chief, he (it is said in terms the most general) "testified that the statements contained in the petition are true,"—which petition as pleading averred the appointment by *an order of the court* of the guardian *ad litem*, that he filed his written acceptance of the office and performed its duties at the settlement. The person alleged to have been thus appointed was Mr. Brickell, the clerk, now deceased, whose duty it was to assist in such settlements, in all cases, whether there were minors interested or not. And appellee, when asked on cross-examination, if he was present when Mr. Brickell was appointed *guardian ad litem*, says: "I can only answer this far, that when I came in to make the settlement, Brickell was told by Judge Scruggs that he was appointed guardian *ad litem*, and to come in and make the settlement." He was interrogated, and answered further, as follows: "What did said Brickell do? Answer: He came forward and attended to the settlement, and scrutinized it pretty much throughout, until the settlement was finished. Was this all said Brickell did? Answer: It was all that I saw him do. This, then, was all that said Brickell did in regard to that settlement,

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either orally or in writing? Answer: So far as I know, it was."

Now, it is evident that this witness, in testifying to the truth of the petition, did so only according to his belief, or information and belief. He no more saw Mr. Brickell sign and file his written acceptance, which it is argued was lost, of the appointment of guardian *ad litem*, than he saw an order appointing him entered on the minutes of the court. There is no evidence in this cause, record or *quasi* of record, or memorandum made by the judge, of such appointment—acceptance or service,—and no testimony that any record evidence thereof did exist and had been destroyed or was lost. Although a larger liberty is elsewhere allowed on this subject, it has long been the settled doctrine of this tribunal, that the judgment entries of the courts of record in this State were of too important and inviolable a character to be altered after the expiration of the terms when they were made, except upon evidence from the records, or dockets, or memoranda made under the authority of the judge presiding when they were made.

The probate judge erred in allowing the amendment; and the order authorizing it must be reversed, the amendment set aside, and the cause be remanded.

Donley, Adm'r, v. McKiernan.

Bill in Equity to set aside Conveyance.

1. *Conveyance; who can assail.*—To entitle a party to assail and avoid a conveyance, on the ground that it is fraudulent as to creditors, complainant must show, among other things, that he was a creditor of the grantor, at or before the making of the conveyance.

2. *Judgment; what not evidence of.*—The record of a judgment recovered against the grantor after his execution of a deed to another, is not evidence as to such grantee, to show an indebtedness prior to its rendition.

APPEAL from Colbert Chancery Court.

Heard before Hon. H. C. SPEAKE.

The opinion states the case.

KEYES & JONES, for appellant.

J. B. MOORE, *contra*.

MANNING, J.—The object of the bill in this cause was to
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set aside deeds of conveyance from Charles B. McKiernan and others at his instance, to Rebecca, the wife of said Charles, executed in 1866, and alleged to be fraudulent and void as against complainant. The latter is administrator of a deceased creditor of Chas. B. McKiernan, against whom a judgment was rendered for the debt, in the Circuit Court of Franklin county, on the 26th of March, 1867. The suit, in which this judgment was rendered, was begun in March, 1866; and the only evidence in the record of the indebtedness, is the record of the suit and judgment.

Without consideration of any other question, which it would be necessary to decide before rendering a decree in favor of appellant, let us see whether he has proved himself entitled to relief as a creditor by virtue of his being such, or the representative of a person who was a creditor of Charles B. McKiernan, before or at the time when the deed was made. This was executed under the decree of a Court of Chancery, in which she claimed that her husband was indebted to her for property of her's appropriated to his use.

In this cause, she, Mrs. McKiernan, is the principal defendant. It is landed estate which she claims to be the owner of, that is sought to be subjected to the payment of her husband's debt. Hence, unless evidence admissible and operative against her, prove the existence of this before or when her title accrued, the complainant does not show himself to be one who could have been defrauded, hindered or delayed by the conveyance to her, or therefore entitled to any decree in his favor.

Now, the record of a suit at law between complainant's intestate and Charles B. McKiernan—being in respect to the wife of the latter, *res inter alias acta*—is evidence against her, only of the fact that such a judgment was rendered, and of the time of its rendition. It does not, nor does any recital in the pleadings, operate as proof against Mrs. McKiernan of the time when the debt originated, for which the judgment was rendered. It is evidence against her only as of the date of the judgment. And other evidence was necessary to establish the pre-existence of the debt, and show that it was created before her title was obtained.—*Snodgrass v. Br. Bank*, 25 Ala. 161; *Henry v. Sims, Harrison & Co.* 60 Ala. 185.

No such evidence was adduced or offered.

It follows that the decree of the Chancellor must be affirmed.

[Hunt, Adm'r, v. Houtz et al]

Hunt, Adm'r, v. Houtz et al.*Certiorari.*

1. *Judgment; who may appeal from.*—It is only a party or privy prejudiced by a judgment or decree, who can prosecute an appeal or *certiorari* for its reversal, and this rule applies as well to judgments rendered by justices of the peace as to judgments of superior tribunals.

2. *Same.*—An attachment levied on property as that of the defendants in the suit, but which in fact belongs to a stranger, and a judgment rendered between the parties to the suit, will not bind such stranger, or authorize him to intermeddle with the defense of the suit, or appeal from the judgment rendered in it; the law affords the owner of the property an appropriate remedy to enforce his claim to the property, and this he must pursue, and whether he does this or not, he can not intermeddle with the original suit, or appeal from the judgment rendered in it.

APPEAL from Jackson Circuit Court.

Tried before Hon. LOUIS WYETH.

This was an attachment sued out before a justice to enforce a debt due by the appellee, Houtz, to the intestate of appellant, C. W. Hunt. Judgment was rendered subjecting the cotton levied on as the property of Houtz. White, the other appellee, obtained a *certiorari* and removed the cause to the Circuit Court. The petition for *certiorari* averred that White was claimant before the justice. Motion was made to dismiss the *certiorari* on the ground that White was without right to appeal from the justice's judgment. The court overruled the motion, and this action is now assigned as error.

ROBINSON & BROWN, for appellant.

HUMES & GORDON, *contra*.

BRICKELL, C. J.—It is only a party or privy, prejudiced by a judgment or a decree, who can prosecute an appeal, or a *certiorari*, for its reversal; and the principle applies as well to judgments rendered by justices of the peace as to judgments rendered by a superior tribunal. Nor can an appeal be prosecuted from any other than a final judgment, rendered by a justice of the peace. And if an appeal is prosecuted from any other than such judgment, it is the duty of the court, *ex mero motu*, to repudiate it.

It is too plain for argument, that whatever may be the
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right or title of White, to the cotton, on which the attachment of the appellant against Houtz was levied, that he is neither a party or privy to that suit, and is without right to intermeddle in its prosecution or defense; or to appeal from the judgment which may have been rendered therein. There is no other judgment to support the *certiorari* than that against Houtz, and to that judgment White was a stranger.

If there was a contest before the justice, as to the validity of White's claim to the cotton, it was irregular and unauthorized. No judgment was or could have been rendered, which would bar White from asserting his claim in an appropriate mode. That mode he may have been pursuing; but whether he was pursuing it or not is immaterial. The law can not tolerate the possible anomaly to which it would give rise—if the *certiorari* was entertained—the prosecution of two suits for the same cause—the one in a court of original, and the other in a court of appellate jurisdiction. The motion to dismiss the *certiorari* ought to have prevailed. It is not necessary to consider any other question, as this must be decisive of the case.

Reversed and remanded.

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Detinue.

1. *Mortgage of chattels; payment of debt secured by; effect of.*—The payment of a debt secured by a mortgage of personal chattels, operates as a satisfaction of the mortgage and extinguishes the title conveyed by the mortgage.

2. *Charge; what not ground for reversal.*—Where, in an action by the mortgagee against the mortgagor to recover the mortgaged property, it is shown that the note secured by the mortgage was given for money loaned at usurious interest, and the mortgagor has paid, or tendered to pay the principal, and brings the money into court, a charge that if the jury believe these facts, plaintiff was entitled to recover only the costs of the suit, contains no error prejudicial to the plaintiff, and furnishes no ground for a reversal on appeal by him.

APPEAL from Coffee Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

This was an action of detinue, brought by the appellant, Samuel Shiver, against the appellee, W. T. Johnston, to recover certain personal property. On the trial, it was shown the property had been mortgaged by the appellee to appellant; that the mortgage was past due, and that the property

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was in the possession of the appellee. It was shown by the appellee, that the mortgage was given to secure the payment of two hundred dollars, lent by the appellant, at the rate of twenty-five per cent. per annum; that to secure the repayment of this amount, with the agreed interest, he had executed his note, secured by mortgage, on the property sued for; that before suit brought he had paid on the debt secured by the mortgage, one hundred and fifty dollars, and had offered to pay fifty dollars more, which offer had been refused by appellant. This fifty dollars was brought into court and paid to the clerk.

This was all the evidence, and upon this the court charged the jury, "that if they believed from the evidence, that the note for which the mortgage was given to secure the payment of, was given for borrowed money, and there was more than legal interest included in said note, and the defendant had paid all of the principal of said note that was borrowed, including the fifty dollars paid to the clerk, then the defendant had a right to plead usury, and that would be a payment of the entire debt, and the plaintiff would not be entitled to recover in this action, except for costs of the suit." The court further charged the jury, among other things, "If there is nothing now due the plaintiff from the defendant, on his, plaintiff's mortgage, he was not entitled to recover except the cost." These charges were excepted to by the plaintiff. The plaintiff then requested the court to charge the jury, "If they believed the evidence, they must find for the plaintiff." This charge was refused, and an exception reserved to its refusal. The charges given, and the refusal to charge as requested, are now assigned as error.

W. D. ROBERTS, for appellant.

W. D. WOOD, *contra*.

MANNING, J.—The payment of a debt, secured by a mortgage of personal chattels, operates as a satisfaction of the mortgage and extinguishment of the title it conveyed to the creditor.—*Harrison v. Hicks*, 1 Porter, 423, 431; 5 Stew. & Port. 91.

There is no dispute that according to the testimony, the note secured by the mortgage, was given to the appellant, who was plaintiff below, for money lent by him to appellee at the usurious rate of twenty-five *per cent. per annum*. The lender forfeited thereby his right to any interest. The debt was discharged by repayment of the sum borrowed.

One hundred and fifty dollars having been repaid to ap-

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pellant and the remainder of the amount lent, tendered and offered to him, and refused, and this sum having then been brought by defendant into court and there deposited and left for plaintiff in this cause, operated as a payment in full of the debt; and there was no error prejudicial to appellant in the charge of the court, that if the jury believe these facts proved by the evidence, plaintiff was entitled to recover only the costs of the suit.

Let the judgment be affirmed.

Lemay, Ex'r, v. Walker.

Action against Executor for Services rendered Testatrix.

1. *Witness; competency of, under act of March 2, 1875.*—The act of March 2, 1875, (now forming § 3058 of the Code of 1876) is in its nature and character, a revision of and substitute for, all former statutes touching the competency of parties as witnesses, and furnishes the only rule by which the competency of parties is to be determined in suits or proceeding before any court or officer other than criminal cases, and necessarily repealed former statutes on the subject, though containing no express words of repeal; and among the statutes so repealed, is that making the parties competent witnesses in suits before justices of the peace, when the matter in controversy does not exceed twenty dollars.

APPEAL from Lauderdale Circuit Court.

Tried before Hon. W. B. Wood.

The appellee, A. W. Walker, commenced this action before a justice of the peace, against the appellant, C. W. Lemay, as the executor of Harriet Boothe, deceased. Judgment having been rendered against the appellant, he appealed to the Circuit Court. The bill of exceptions recites, "that on the trial of the cause, the plaintiff produced an account against defendant's testatrix for services alleged to have been rendered to her during her life, for the sum of fifteen dollars, and to prove and establish said account, introduced the plaintiff as a witness for that purpose, to testify as to statements made by and transactions with said defendant's testatrix in her life time." The defendant objected to the plaintiff as a witness to testify to such statements and transactions, but his objections were overruled, and he excepted, and judgment being rendered against him, he brings the case here by appeal, and assigns the ruling of the court as error.

R. O. PICKETT, for appellant.

No counsel for appellee.

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BRICKELL, C. J.—A limitation on the competency of parties as witnesses, imposed by the act of March 2, 1875, now forming § 3058 of the Code of 1876, is, “that neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatever to the party against whom such testimony is sought to be introduced.” Prior to the adoption of the statute of 14th February, 1867, rendering parties competent witnesses (which formed § 2704 of the Revised Code of 1867), there were various statutes authorizing parties to testify, subject to particular limitations and exceptions expressed in them. Among others, was § 2779 of the Code of 1852, which, in proceedings before justices of the peace, allowed either party to testify in his own behalf, when the amount in controversy did not exceed twenty dollars. With the exception of this section of the Code of 1852, these statutes were referred to, and expressly repealed by the act of 14th February, 1867.—Pamph. Acts 1866–7, p. 435, § 2. This repealing clause was not embodied in the Revised Code; but simply the general provisions of the first section of the act, declaring parties competent witnesses, with a limitation or exception akin to that found in the present statute, of suits or proceedings by or against executors or administrators. The section of the Code of 1852 (2779), to which we have referred, was nevertheless embodied in the Revised Code of 1867, as § 3218. We have heretofore decided the result was that this section of the Revised Code was repealed by § 2704.

Independent of that consideration, the act of March 2, 1875, is in its nature and character, a revision of, and a substitute for all former statutes touching the competency of parties as witnesses, and furnishes the only rule by which the competency of parties is to be determined, *in suits and proceedings before any court or officer, other than criminal cases*. It is an old and well defined rule of statutory construction that a subsequent statute, revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate a repeal of the former.

The appellee was incompetent to testify to any statement by, or transaction with, the testatrix of the appellant, and in permitting him to testify, the Circuit Court erred. For the error, the judgment must be reversed and the cause remanded.

[Gans v. Williams.]

Gans v. Williams.

Detinue for Cattle.

1. *Statutory separate estate ; validity of mortgage of.*—A married woman cannot make a valid mortgage of her statutory separate estate to secure a debt of any description.

2. *Same ; what part of.*—The natural increase of domestic animals, forming part of the *corpus* of the statutory separate estate of a married woman, is the property of the wife ; and a mortgage of the progeny made by husband and wife, passes no title to the mortgagee, and will not defeat detinue by the wife for its recovery.

APPEAL from Clarke Circuit Court.

Tried before Hon. HENRY T. TOULMIN.

The appellee, Emeline M. Williams, brought this action against the appellant, Herman Gans, to recover the possession of certain cattle. It was shown that the property sued for was the progeny of cattle which had been purchased with moneys belonging to the statutory separate estate of the plaintiff. Plaintiff and her husband had mortgaged these cattle to Gans, who took possession of them under his mortgage, and was proceeding to sell the same. The appellant requested the following written charges : " All the property acquired by a married woman, by her own labor and exertion, during her married life, is the property of her husband. 5. If the property in question is wholly the offspring or accession derived from other property which belongs to Mrs. Williams, then, in such case, Mrs. Williams, during the life of her husband, cannot recover such property in a suit in her own name. 8. If the property in question was the increase or natural accession to the plaintiff's separate property, and was mortgaged to defendant with the consent of plaintiff, and she joined in the mortgage by signing, she is estopped from denying same, and if by such means her husband obtained from defendant any thing of value, she cannot claim the property until the mortgage is paid in full. 10. If the jury find that all the property sued for is the natural increase arising from plaintiff's separate estate during coverture—plaintiff being a married woman, she cannot recover in this action—in such case the suit should be in the husband's name alone, and this would be the case whether there is any thing due on the mortgage or not." The court refused to give either of these charges, and to each refusal the

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defendant separately excepted, and now assigns the same as error. There was verdict and judgment for plaintiff.

THOS. H. PRICE, for appellant.—The increase of live stock belonging to the wife's statutory separate estate during coverture, is a part of the income and profits thereof. It is well settled in this State that a married woman cannot sue for and recover in her own name, the rents, income and profits arising from her separate property during coverture.—37 Ala. 513 ; 30 Ala. 143 ; 33 Ala. 160 ; 29 Ala. 532.

WATTS & SONS, *contra*.—The first charge was abstract and properly refused. There was no evidence to sustain it, and its only tendency would be to mislead the jury.—42 Ala. 108 ; 21 Ala. 473. The natural increase of cattle which form part of the wife's separate estate, constitute part of the *corpus* of her estate. The husband has no estate in the property of the wife except as trustee.—*Flanagan v. Patterson*, 37 Ala. This suit relates to the separate statutory estate, unless the natural increase of her cows does not belong to her but to her husband, and if it is her property the suit is properly brought in her name.—35 Ala. 502. The mortgage was absolutely void ; it could create no estoppel.—*Bigelow on Estop.* 276 ; *Chapmans v. Abrahams*, 61 Ala. 108 ; *Stolla v. Peeples*, 57 Ala. 53.

STONE, J.—Mrs. Williams had moneys, her statutory separate estate. During the coverture, her husband invested this money in cattle, which had increase. Williams and wife jointly made a mortgage to Gans, conveying to him the younger cattle, progeny of the stock so bought with the statutory separate moneys of Mrs. Williams. Claiming that the mortgage debt had not been paid off, Gans took possession of the cattle, and advertised them for sale under his mortgage. Thereupon Mrs. Williams instituted the present suit for the recovery of the cattle, and under the charge of the court, the verdict and judgment were in her favor.

It must be regarded as settled in this State that a married woman cannot make a valid mortgage of her statutory separate estate, to secure any description of debt.—*Peeples v. Stolla*, 57 Ala. 53, which collects the authorities ; *Chapman v. Abrahams*, 61 Ala. 108. The point of real merit in this case raises the inquiry, whether the increase of domestic animals, the statutory separate estate of the wife, given birth to during the coverture and continuance of the husband's trusteeship, belongs to the husband or to the wife? For appellant it is contended that the statutes known as the

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woman's law vest in the husband an estate during the life of the wife, in her personal chattels, and that the increase or issue, being an accretion during the continuance of the husband's estate, thereby becomes his property. If the first branch of this proposition be true, the last would seem to follow as a consequence.—*Wicks v. Greer*, 14 Ala. 437, and authorities on appellant's brief. In *Weems v. Bryan*, 21 Ala. 302, it was held by this court that the husband is tenant for the life of the wife of her statutory separate estate, and as such, entitled at her death to emblements. Later cases controvert that doctrine. In *Boaz v. Boaz*, 36 Ala. 334, it is said, "the husband is not vested with a title in his own right for any space of time, to the wife's separate estate." In that case it is further said that the husband's right is "subordinate to the great purpose of providing a maintenance for the family." This language is inconsistent with the idea that the husband has any personal ownership whatever in the wife's statutory estate.—See, also, *Patterson v. Flanagan*, 37 Ala. 513. In the later case of *Hayes v. Cockrell*, 41 Ala. 75, *Weems v. Bryan* was entirely overruled, and it was then declared that the husband holds only as trustee, not in his own right. He has authority to manage and control the property, and can "not be required to account with the wife, her heirs or legal representatives, for the rents, income and profits thereof." This, with the other powers conferred on the husband by the statute, was doubtless framed with a view to the harmony and happiness of the family, and to prevent the unseemly spectacle of husband and wife as adversary litigants in the courts of justice. It was no part of its purpose to confer on the husband any actual ownership in the wife's property.

The questions raised on this record all grow out of charges asked and refused. Charge numbered one is abstract, for the record contains no evidence that any of the property in controversy was the earnings of the wife's labor during the coverture. The other charges all relate to the question we have been discussing, and, according to the principles we have laid down, were all rightly refused.

Affirmed.

[Hardy v. Sulzbacher & Bro.]

Hardy v. Sulzbacher & Bro.

Appeal from Order to Sell Lands Claimed as a Homestead.

1. *Exemption of homestead; amount of in 1871.*—There was no law of force applicable to homestead exemptions against debts contracted in 1871, except the Constitution of 1868, which exempted eighty acres as a homestead, and no more.

2. *Same; what order to sell lands claimed should contain.*—Where the debtor claims as a homestead more than he is entitled to, the court should compel him to select the amount he is entitled to claim, and order a sale of the balance, and an order to sell the whole tract, except the homestead of the proper amount, without specifying what lands shall constitute such homestead, is erroneous.

APPEAL from Dallas Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

The appellees, A. Sulzbacher & Bro., having obtained two judgments against the appellant, T. A. Hardy, before a justice of the peace, and executions issued thereon having been levied on certain lands belonging to him, amounting to one hundred and fifty-five acres, moved in the Circuit Court for an order to sell said lands. Hardy appeared and filed his claim to the land as exempt as his homestead. The bill of exceptions recites that the plaintiff established, by evidence to the satisfaction of the court, that the said debts so in judgment, were contracted by the defendant with the plaintiff in 1871, and thereupon the said plaintiff moved the court for an order to sell the said lands described in the said motion, except as to the homestead of defendant, not exceeding eighty acres, which motion the court granted, and then and there ordered that the said lands, in said motion described, over and above eighty acres, be sold to satisfy the plaintiff's said judgment; and the defendant excepted, and now assigns as error the rendition of the judgment, and the order to sell the lands, without specifying the portion to be held as exempt.

REID & MAY, and WATTS & SONS, for appellant.

STERRETT & MABRY, *contra*.

No briefs came into Reporter's hands.

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STONE, J.—The main question presented by this record is, whether, under the facts of this case, Hardy was entitled to a homestead of 160, or only 80 acres. The record recites that the plaintiff “established by evidence to the satisfaction of the court, that the said debts so in judgment, were contracted by the defendant with the plaintiff in 1871.” There was no law of force, applicable to homestead exemptions, against debts contracted when these were, except the Constitution of 1868, which exempted 80 acres as a homestead, no more.—Const. of 1868, Art. 14, Sec. 2. The Circuit Court ruled rightly in fixing the quantity of appellant’s homestead at 80 acres.—*Wilson v. Brown*, 5 Ala. 62; *Gunn v. Barry*, 15 Wal. 610; *Miller v. Marx*, 55 Ala. 322; *Nelson v. McCreary*, 60 Ala. 301.

It is also assigned as error that the Circuit Court should not have ordered a “sale of the lands described in the levy of the sheriff, except eighty acres which is claimed by the defendant, and allowed under the Constitution of the State of Alabama;” but should have designated what particular lands were exempt, and what lands should be sold. The bill of exceptions recites that the “plaintiff moved the court for an order to sell the said lands described in the said motion, (the whole tract,) except as to the homestead of the defendant, not exceeding eighty acres, which motion the court granted.” And thereupon the court proceeded to render the judgment which is copied in quotation marks above, without further specification of what should constitute the exempt homestead. It is manifest that a sheriff, selling under this order, could not know what he was selling, and the purchaser could not know what he was buying. Hardy, the claimant of the homestead, should have been put to his selection, and the order of sale should have been made to specify what lands the sheriff should sell. If, on being inquired of, Hardy refused or failed to make his selection, we will not say he would not thereby forfeit his homestead, for the only claim he had previously made was of the whole tract of 155 acres. This, we have seen, he was not entitled to.—See *Preiss v. Campbell*, 59 Ala. 635.

Reversed and remanded.

[Harper v. Claxton.]

Harper v. Claxton.

Action for Money Had and Received.

1. *Action for money had and received ; when maintainable.*—Privity of contract is not necessary to support an action for money had and received ; the law implies the promise to pay, whenever the defendant has money in his hands, the property of the plaintiff, and which the defendant has no legal right to retain.

2. *Same.*—In such a case, even if there be an express promise to pay, a breach entitles the plaintiff to recover only a sum certain, or capable of being rendered certain, and a common count is as appropriate for a recovery as a count stating the promise and its breach, unless the promise was conditional and dependent.

3. *Same.*—Money paid on a contract which is rescinded, is recoverable in a count for money had and received ; and though there may be no purpose or intention on the part of him who rescinds the contract to pay it, yet, if by his conduct and acts he induces the other party to believe he will pay, he is bound to the same extent that he would be, if he had in express words promised payment.

APPEAL from Coffee Circuit Court.

Tried before HON. HENRY D. CLAYTON.

The appellee, Rhoda Claxton, brought this action against the appellant, Robert Harper, to recover one hundred and fifty dollars. The complaint originally contained four counts, but was amended by striking out all but the first count, which was a count for money had and received. The other counts were for the failure to carry out a contract for the purchase of a horse. On the trial, plaintiff, as a witness in her own behalf, testified, "that in the spring of 1872 she purchased a horse from the defendant for the sum of two hundred dollars ; that she only had one hundred and fifty dollars of the money, which she paid over to the defendant, and he let her have the horse for the purpose of going to a neighboring town to get the balance of the money ; that after she had kept said horse a few weeks, defendant came to her house and told her he had come after the horse or the money, meaning the fifty dollars then due ; that she gave up the horse to the defendant, and that it was her understanding that defendant was to pay her the sum of one hundred and fifty dollars, the amount paid by her." Upon cross-examination, plaintiff was asked if defendant agreed to make said payment when he went after the horse, to which she replied, "that was her understanding, but she could not state what he understood." The defendant testified in his own behalf,

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that the sale was a "cash trade," but that the plaintiff only paid one hundred and fifty dollars, and he delivered the horse to her for the purpose of going after the balance of the money, and with the express understanding that she was to return the horse in a few days, if she did not pay the money, and the defendant was to hold the horse for the payment of the balance. He further testified that the plaintiff carried the horse off, and after waiting on her for several weeks, he went to her house and told her "that he had come for the horse or the money one;" and in accordance with the agreement, "she immediately got the horse and turned it over to him, saying at the time that she did not have the money, but would get it in a few days and carry it to him and get the horse back."

He also testified "that he did not agree to pay the plaintiff any money back; that he took the money which was paid him by plaintiff and bought him another horse immediately, and before he took said horse back, which he would not have done if he had not sold the horse to plaintiff; that shortly after he carried said horse home, the plaintiff informed him that she had concluded not to take the horse, and wanted defendant to pay her one hundred and fifty dollars back, which he declined to do, but stated to her that he was ready to deliver the horse when she paid the balance of the money, and further stated to her that he could not pay her the one hundred and fifty dollars; that he had spent it, or a part of it, for another horse."

This was all the evidence, and the court, among other things, charged the jury: That if they find, from the evidence, that the title to the horse passed from defendant to plaintiff, then plaintiff cannot recover in this action, unless at the time he went to take the horse back, he agreed to pay her one hundred and fifty dollars, and he need not have agreed to do so in words, but would be held to have done so, if his acts and conduct towards her at the time was such as to have induced the belief upon her mind that he would do so, or if he used any undue advantage by which the plaintiff was induced to surrender the horse to him." The court also charged the jury, that if they find for the plaintiff, they must also calculate the interest from the time the plaintiff's right of action accrued. To each of these charges the defendant excepted, and they are now assigned as error.

JOHN D. GARDNER, for appellant.

W. D. WOOD, *contra*.

[Russell v. Russell.]

BRICKELL, C. J.—The complaint, as amended, contained a single count for money had and received. Such a count is appropriate for the recovery of money which the defendant may have in his possession of right belonging to the plaintiff. Privity of contract is not necessary to support the count. The law implies the promise to pay, whenever the defendant has money in his hands the property of the plaintiff, and which the defendant has no legal right to retain. If the defendant expressly promises to pay, a breach of the promise entitles the plaintiff to recover only a sum certain, or capable of being rendered certain, and a common count is as appropriate for a recovery as a count stating the promise and its breach, unless the promise was conditional and dependent.

Money paid on a contract which has been rescinded, is recoverable on a count for money had and received.—2 Green. Ev. § 124. There may be no purpose or intention on the part of him who rescinds the contract to pay it, but if by his acts and conduct he induces the other party to believe that he will pay, he is bound to the same extent that he would be if he had in words expressly promised payment.

This is in substance the charge of the court, and the judgment is affirmed.

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Trover for Conversion of Cotton Seed.

1. *Complaint; defects in, when cured by judgment.*—Whether or not a count in trover is demurrable, for a failure to lay the time of the conversion, the want of such averment is cured by judgment, without objection on that account in the court below.

2. *Tenants in common; when may maintain trover against another tenant; set-off to such action, when maintainable.*—If one tenant in common of a chattel converts it wholly to his own use, by a sale, his companion may maintain trover against him; and one tenant by agreement, express or implied, with the other, may be entitled to contribution for services rendered or expenditures made; and the share which the other tenant ought to contribute, would be recoverable in *assumpsit*, and would be matter of set-off in an action *ex contractu*, but not in defense of trover, which is in *tort*.

APPEAL from Barbour Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The appellee, Lucius A. Russell, sued the appellant, W. Frank Russell, before a justice of the peace, for the sum of ninety dollars, "as damages for the conversion by him, on

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the.....day of....., of the following chattels: Four hundred and fifty bushels of cotton seed, and fifteen bushels of corn, the property of the plaintiff." Judgment having been rendered against the defendant, he appealed to the Circuit Court, when the complaint set out above was again filed. The cause was tried upon pleas of the general issue and set-off, and resulted in a verdict and judgment for the plaintiff. The plaintiff, as a witness for himself, testified "that about the first of the year he contracted with the defendant to farm with him on his (the defendant's) lands, known as the Davis place; that the defendant was to furnish the land, plow animals and feed for the same, and a certain lot of cotton seed, which he represented to be about four thousand bushels, for manure. Plaintiff was to furnish the laborers and feed them, and the crop was to be divided equally between them.

Plaintiff further testified, that under this contract he had made a crop amounting to about thirty bales of cotton, besides corn and other produce; that this cotton had been ginned on defendant's gin and the seed retained by him, and that he refused to deliver half of them to plaintiff. That the seed yielded in ginning a bale of cotton about thirty to thirty-three bushels, and that the cotton seed in controversy had been used by defendant, and had been worth since that time from ten to twenty cents a bushel; that the crop made by plaintiff had been equally divided between him and the defendant, except said seed, and their mutual accounts settled.

The defendant was then introduced as a witness and testified substantially as plaintiff did, as to the contract and the amount of the crop made, except he said that the quantity of seed to be used for manuring purposes was not mentioned in making the contract, and not until about a month after the contract was made, and after plaintiff had moved on the place.

The court, among other things, charged the jury, that "although there may have been no agreement by defendant, in the original contract, as to the quantity of manuring seed, if, without any request from plaintiff, he voluntarily furnished the three or four thousand bushels of seed for manuring purposes, and nothing was said about pay therefor, although plaintiff used said seed for the purpose of manuring the crop, no promise to pay for them could be implied therefrom so as to entitle the defendant to a set-off for their value. To this charge the defendant excepted, and now assigns the same for error.

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JOHN A. & J. W. FOSTER, for appellant.—The complaint does not state any date when the conversion was alleged to have been made, and in the absence of such averment discloses no substantial cause of action, and therefore a plea to the merits will not cure such defect.—4 Stew. & Por. 397; 9 Por. 629; 2 Ala. 401; 8 Ala. 45. Nor will the verdict cure such defect, when it is of such a character, that the complaint does not disclose any substantial cause of action.—33 Ala. 206; 31 Ala. 529; 41 N. Y. 621; *Boyce v. Brown*, 7 Barbour; *Gray v. Palmer*, 2 Robertson.

The law implied a promise by the plaintiff to pay for the cotton seed he used, and the defendant may avail himself of this by plea of set-off. The evidence fails to show any partnership between the parties. This set-off is in the nature of a suit, and if one joint owner may maintain trover for his part of the crop, the other may maintain assumpsit for articles furnished or services rendered, whether the contract was express or implied.

J. M. WHITE, *contra*.—The complaint contains a substantial cause of action. The mere omission to allege the date of the conversion renders the complaint only defective. Such defects are cured by the pleadings and verdict.—13 Ala. 529; Minor, 118. Such defects can only be taken advantage of by demurrer, or by requesting a proper charge from the court. They can not be raised for the first time in this court.—Minor, 118; 42 Ala. 658. The contract established in this case creates a tenancy in common between the parties.—17 Ala. 362; 49 Ala. 254; 49 Ala. 253. Actions of assumpsit do not lie between tenants in common, except upon express contracts. The doctrine of implied contracts does not apply.—17 Ala. 733. The appellant can recover by way of set-off, for the cotton seed used on the joint farm, only upon an express contract on the part of appellee to pay for them.—17 Ala. 733. The charge excepted to is free from error, and if it were not it does not injure appellant, for the testimony of both shows that the seed were furnished in accordance with the contract. The only difference was as to the quantity of seed to be furnished.

BRICKELL, C. J.—The statement of the cause of action, which a plaintiff is required to file, on an appeal or *certiorari* from the judgment of a justice of the peace, when the sum claimed exceeds twenty dollars, is not subject to the technical rules of pleading. If it discloses in general terms a breach of a contract, or a wrong done, of which the justice has jurisdiction, it is sufficient.—*Hanks v. Hinson*, 4 Port. 509;

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Spence v. Boyd, 2 Stew. 480; *Morrison v. Morrison*, 3 Stew. 444. The complaint or statement in this case would have been more formal if, following the form of complaint for trover in the Circuit Court, given by statute, it had averred the time of the conversion of the chattels. Whether the omission of such an averment would have been ground of demurrer, it is not necessary to inquire, as none was interposed. An averment of the precise time was not necessary. It was only necessary to state any day prior to the commencement of suit.—1 Chit. Pl. 252. The want of such an averment is cured by the judgment in the absence of all objection in the Circuit Court.—*Allen v. Dickson*, Minor, 118; *Walker v. Mobile Marine Ins. & Dock Co.* 31 Ala. 529.

The relation between the parties was that of tenants in common of the crops grown on the lands cultivated by them. *Thompson v. Mawhinney*, 17 Ala. 362; *Stratther v. Butler*, Ib. 733; *Smyth v. Tankersley*, 20 Ala. 212. If one tenant in common of a chattel, by a sale, converts it wholly to his own use, his companion may maintain an action of trover against him.—*Parminter v. Kelly*, 18 Ala. 716; *Williams v. Nolen*, 34 Ala. 167. One of the co-tenants may, by an agreement express or implied, with his cotenant, be entitled to contribution for services rendered or expenditures made.—*Strother v. Butler*, *supra*. The share of the co-tenant, the amount he ought to contribute, would be recoverable in an action of assumpsit, and would be the matter of set-off in an action *ex contractu*. Trover is an action for a tort, and a set-off is not available in its defense.—*Pattison v. Richards*, 4 E. D. Smith, 162 *Moore v. Davis*, 11 Johns. 144; *Pattison v. Richards*, 22 Barb. 143. The charge of the court was not in any event prejudicial to the appellant.

Affirmed.

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Habeas Corpus.

1. *Habeas corpus, statutes concerning construed.*—Our statutes regulating the writ of *habeas corpus*, are not to be regarded as taking away the common law jurisdiction of courts to employ the writ to bring before them the body of a person illegally imprisoned; and where the imprisonment is under legal process, or judgment of an inferior court, to award a writ of *certiorari* removing the record; and when the writ is thus issued the proceeding is in its nature appellate, and there may be any inquiry into the regularity of the process, judgment or sentence.

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2. *Same*.—When, however, the writ is sued out under the statutes, before a single magistrate upon whom they confer the jurisdiction to be exercised in vacation, the proceeding is not in its nature appellate, but rather original; and the process or sentence being drawn in question collaterally, *illegality* only, and not error or irregularity can be inquired into, and illegality not being shown, the prisoner can not be discharged, however gross the error or irregularity.

3. *Illegal imprisonment; what is.*—Where the prisoner is sentenced to hard labor for the county, a reasonable length of time, depending upon the circumstances of the particular case, must be allowed for his delivery to the proper authority, whose duty it is to carry out the sentence; and during this interval of time, it is the duty of the sheriff to confine the prisoner in the county jail; if, after such reasonable time, the sheriff still detains the prisoner in the county jail, the imprisonment, though lawful in its inception, becomes illegal, and the sheriff, ceasing to be the person authorized by law to detain the convict, he may be discharged on *habeas corpus*.

4. *Same*.—Prisoner was indicted for grand larceny, and the jury, by their verdict, found him guilty of *petit* larceny, though they assessed the value of the articles stolen at a sum, the felonious taking of which constitutes grand larceny, and assessed a fine. The court, however, passed sentence on the verdict, sentencing the prisoner to hard labor for the county, at its August term, 1878. The commissioners court failed to establish any system of hard labor, and the sheriff still held the defendant in custody, when, on the 27th day of December, 1878, the prisoner made application in vacation to a circuit judge for *habeas corpus*, who refused to discharge the convict, and remanded him to the custody of the sheriff. *Held* :

1. On such an application, inquiry could not be made whether the findings were consistent, or whether the circuit court should have passed sentence on the verdict.

2. The delays between the sentence and the delivery of a prisoner to the proper authorities, to be put to hard labor for the county, was unreasonable; and the sheriff had no authority to detain him under the sentence.

3. There being no authority to substitute imprisonment in jail, for the sentence to hard labor, and the commissioners court having failed, for an unreasonable time after sentence, to establish a system of hard labor, the convict was entitled to his discharge.

APPEAL from judgment of Judge of 12th Judicial Circuit, Hon. WILLIAM L. WHITLOCK.

The facts are stated in the opinion.

WALDEN & SON, for appellant.—It is admitted by the State that there is no hard labor system in Cherokee county; that the prisoner is confined, under the sentence of the court, to hard labor in the county jail, and that no steps have been taken to “hire out” the prisoner.

The statute, Code, § 4487, expressly declares who shall be confined in county jail, and § 4481 shows that persons sentenced to hard labor for the county can only be “confined, chained, or otherwise shackled,” etc., in certain cases, neither one of which apply here; for it is not claimed that *any* court has ordered his confinement as provided by said section. The sheriff would have the same right to punish by stripes, did we have such a punishment under our laws, as he would to confine the prisoner. The sentence is “to hard labor for the county,” not that he be confined in county jail. They

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are separate and distinct punishments. The prisoner should have been discharged.

HENRY C. TOMPKINS, Attorney-General, *contra*.—There can be no doubt that the sentence authorizes the confinement of the convict; it was contemplated by the law that he should be confined in a certain sense at all times, and it is equally certain that an actual confinement in a house at night and at other times when not engaged in the performance of the labor, would not be a false imprisonment. The statute gives the Court of County Commissioners authority to work the convicts on the public roads and other public works, and it seems clear that it would be perfectly lawful, where it was convenient, to use the jail for their confinement when not engaged in work. Then the whole question seems to be reduced to this: does the failure to put a convict to hard labor where the sentence imposes that, in addition to confinement, render the confinement illegal, and entitle defendant to a discharge on *habeas corpus*? There is no evidence that the defendant was in solitary confinement, and the law certainly never contemplated that defendant should be entitled to a discharge because circumstances rendered it impracticable or impossible to impose the more vigorous part of a sentence. If it did, a defendant sentenced to hard labor, which from sickness he would be unable to perform, could not be confined, but must be discharged.—1 Bish. Crim. Pro. § 887, and authorities cited.

BRICKELL, C. J. —The appellant was, at the August term, 1878, of the Circuit Court of the county of Cherokee, indicted for the larceny of several articles of merchandise, the aggregate value of which was averred to be thirty-three 10-100 dollars. On a trial on the plea of not guilty, the jury by their verdict found him guilty of petit larceny, assessed against him a fine of five hundred dollars, and assessed "the value of the property stolen at the sum of \$33 15-100." The fine and costs not being paid or secured, the court sentenced the appellant "to hard labor for the county of Cherokee, as the statute authorizes, under the direction of the Court of County Commissioners of said county, for the period of one hundred and forty days, in satisfaction of the fine in this case, and for an additional period of five hundred and forty days, at fifteen cents per day, to pay or in satisfaction of the costs in said cause, to-wit: forty-seven 85-100 dollars costs of suit, and also in satisfaction of the value of the goods stolen by the defendant as assessed by the jury, to-wit: thirty three 15-100 dollars." The appellant being imprisoned in

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the county jail, on the 27th December, 1878, applied for and obtained from the judge of the 12th judicial circuit, a writ of *habeas corpus* for his discharge. On the return of the writ, and on a hearing, it appearing the appellant was detained by authority of the sentence aforesaid, and that the Commissioners' Court of Cherokee had failed to establish as required by law, a system of hard labor for the county, the judge refused to discharge the appellant and remanded him to imprisonment.

The writ of *habeas corpus* has been defined, or rather described, as "that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained."—Hurd on Habeas Corpus, 129. It is a common law writ, employed by the courts of common law, of superior jurisdiction, and the Court of Chancery, before the enactment of statutes regulating its use. These statutes have not been construed as diminishing the common law jurisdiction of the courts in the employment of the writ. They are regarded as "increasing the facilities for procuring it, enlarging the class of officers having jurisdiction in respect of it, imposing penalties for refusing to grant it, or to obey it, and providing for a speedy return, and prompt trial and discharge of the person, if not held according to the law of the land."—*People, &c. v. Siscomb*, 60 N. Y. 566. The statutes of this State do not extend to the writ as a common law remedy, employed by the courts of superior jurisdiction, or the Court of Chancery, returnable into court, and heard in term time. They treat of it and confer jurisdiction, as a remedy for illegal imprisonment, to be pursued by judicial officers, differing in degree, and of different general jurisdiction, returnable not into court, but in vacation, and heard by the officer as a magistrate, and not as a court.

A superior court, in the exercise of its common law jurisdiction, may employ the writ of *habeas corpus* to bring before it the body of a person illegally imprisoned, and if the imprisonment is under legal process, or the judgment or sentence of a court of inferior jurisdiction, may award a writ of *certiorari*, removing the record. The proceeding is then in its nature *appellate*, and there may be an inquiry into the regularity of the process, judgment, or sentence. When, however, the writ is sued out under the statute, and the jurisdiction conferred by the statute on a single magistrate, is to be exercised in vacation, the proceeding is not in its nature *appellate*, but rather *original*, and the validity of the process, judgment, or sentence, is drawn in question collaterally. The general principle, then, prevails, that when a record, or process, is collaterally assailed, it must be for *ille-*

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gality, not for *error* or *irregularity*. The statute affirms this principle, in declaring that on the return to a writ of *habeas corpus*, there is no "authority to inquire into the legality or justice of any order, judgment, decree or process of any court legally constituted, or into the justice or propriety of any commitment for contempt made by a court, officer, or body, according to law, and charged in such commitment." Code of 1876, § 4961. The word *legality* is here employed in the sense of *regularity*, and not in a sense which would exclude an inquiry into the jurisdiction of the court or officer issuing the process or rendering the judgment. If jurisdiction has not attached—if the process, or judgment, is therefore without authority of law, it is not only *irregular*, but *illegal*. But if jurisdiction has attached, and there is a departure from, or a neglect to observe the prescribed mode of procedure, the process or judgment is merely irregular. However gross may be the irregularity, the correction of it is not the function of a writ of *habeas corpus*, prosecuted under the statute.—*Ex parte McKivett*, 55 Ala. 236.

We do not, consequently, inquire whether the verdict of the jury is in its findings consistent, or if defective, whether the Circuit Court should have pronounced judgment upon it. If there be error in this respect, an appeal is the remedy for its correction if the error is prejudicial to the appellant.—*Ex parte Van Hagan*, 25 Ohio, 426.

The right of the appellant to a discharge must, therefore, depend solely on the fact, that the sentence is to hard labor for the county, and not to imprisonment in the county jail, and the inquiry, whether the sentence authorizes the imprisonment. The statute declares "legal punishments in this State, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, and death by hanging.—Code of 1876, § 4450.

The statutes also carefully define the punishment which may be imposed for each criminal offense. Petit larceny is punishable by imprisonment in the county jail, or hard labor for the county, for not more than twelve months, and at the discretion of the jury, a fine not exceeding five hundred dollars may be imposed. When a fine is imposed, if the party does not pay or secure it, and the costs, he may be sentenced to hard labor for the county, or imprisoned in the county jail.—Code of 1876, § 4455. Hard labor for the county, is under the superintendence and control of the Court of County Commissioners, as are the convicts sentenced to perform it, and they determine in what manner, and on what particular works it is performed. It includes labor on the public

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roads, public bridges, and other public works in the county, and also the letting of the convict to hire. At the first term of the Commissioners' Court in each and every year, it is a duty imposed on the court to determine the employment of convicts sentenced to hard labor for the county. The convict sentenced to hard labor can be confined, chained, or otherwise shackled, only by order of the court trying him, or by order of the Commissioners' Court.—Code of 1876, 940, chap. 3.

When a convict is sentenced to hard labor for the county, or to imprisonment in the penitentiary, a reasonable time must, of necessity, be allowed for the execution of the sentence, by his delivery to the proper authority of the county, or to the proper authority of the State, to receive him. The length of time depends, of course, on circumstances attending the particular case. During this time it is the duty of the sheriff to keep him safely, and the county jail is the proper place for his custody. Such period of imprisonment is not punishment for the offense of which he has been convicted, as imprisonment preceding conviction can not be so considered. Either and both are merely requirements of the law; in the one case to secure personal presence to answer a criminal accusation; and in the other the execution of the sentence of conviction.—*People v. Warden*, 66 N. Y. 342. When such reasonable time has passed, and the sheriff has not delivered the convict to the proper authority, the further detention of the convict by him is unauthorized, and imprisonment in the county jail is illegal. Then, though the original imprisonment was lawful, the convict becomes entitled "to his discharge by reason of a subsequent act, omission or event," and the sheriff ceases to be "the person authorized by law to detain him."

The court could not have sentenced the appellant to hard labor for the county, or in the event the Commissioners' Court had not, in obedience to the statute, performed the duty of prescribing the mode of hard labor, then that he should be imprisoned in the county jail. The law would not sanction such an uncertain or alternative sentence; nor a sentence dependent on matter of fact to be ascertained subsequently by an executive officer. As the court could not originally have made the execution of the sentence to hard labor dependent on the fact that the Commissioners' Court had prescribed the manner of hard labor, and rendered the execution practicable, or if the execution was impracticable, because of the omission of the Commissioners' Court, then substituting imprisonment in the county jail, surely, the sheriff is without authority to substitute imprisonment for

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hard labor. The sentence of a court must clearly express the punishment the convict of crime is to suffer, and when it is so expressed, the sentence is authority for the infliction of that punishment only, and not for the infliction of another and different punishment. The law does not intend that hard labor for the county shall be accompanied by imprisonment in the county jail, unless to prevent escape, it is so ordered by the court trying him, or by the Commissioners' Court. When so ordered, the imprisonment is not as part of the punishment, but a requirement of the law to secure the performance of the hard labor. It was not ordered in this case, and the imprisonment, much more than a reasonable time having passed for the delivery of the appellant to the proper authority of the county, is illegal, not warranted by the sentence. If the present imprisonment is legal, it may well be asked, when will it become illegal—when will it terminate? The sentence does not express any period of imprisonment, and is it to be prolonged indefinitely, awaiting the action of the Commissioners' Court to prescribe the mode of its execution, and to appoint a superintendent, or let the appellant to a hirer, to whom he may be delivered? What will be the term the appellant must serve—that prescribed by the sentence, or will it be diminished by the time of his imprisonment? Who has the authority to make the diminution?

The imprisonment is illegal—not warranted by the sentence of the Circuit Court, the only authority for it, which is shown, and the appellant is entitled to a discharge. The result is the consequence of the neglect of the Commissioners' Court to perform the duty the statute has expressly charged upon it. The *habeas corpus act* contemplates that such omissions may occur, and require the discharge of a person becoming entitled to it, "by reason of some subsequent act, omission, or event," when the imprisonment may have been originally lawful.—Code of 1876, § 4962.

The judgment must be reversed, and a judgment here entered discharging the appellant from further imprisonment.

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Bean, Adm'r, v. Chapman et al.*Action against Sureties on Bond.*

1. *Demurrer; rulings on, how must be shown.*—Rulings upon demurrer will not be revised, unless shown of record on the minutes; but it is not necessary that such ruling should appear in the final judgment entry, if the ruling appears from a separate, independent entry on the minutes.

2. *Interest; when recoverable.*—Interest is not recoverable on a debt due by a citizen of one State to a citizen of another State, during the period their respective countries are at war, as all unlicensed intercourse between them is forbidden; but where the payee of a note and the sureties thereon are residents of the same country, they may lawfully make payment and stop interest; and they are liable accordingly in a suit against them, though, by reason of their principal being an alien enemy of the creditor, the latter could not recover interest of the principal in a direct suit against him.

3. *Same.*—In such a case the law reduces the principal's liability, without the fault or procurement of the creditor; and the principal's defense against recovery for interest is a personal defense, not available to the surety, unless he also have a personal defense.

4. *Probate judge; incompetency of, manner in which duties of must be performed by register.*—When the Probate Judge is incompetent to act in any matter of administration, the statute provides that his duties shall be discharged by the Register in Chancery, who, upon proper certificate, &c., becomes as to such administration Probate Judge *pro hoc vice*, and continues such while the disqualification of the judge continues, and thereon the jurisdiction of the Probate Judge ceases, and the register may appoint an administrator, or make other needful orders; but the record of his acts is kept in the Probate Court, the judge of which is the custodian of the record, and the proper officer to certify a transcript of such proceedings; the Register in Chancery as such has no authority to certify such proceedings.

5. *Administrator de bonis non; presumptions as to order appointing.*—On collateral assault upon an order appointing an administrator *de bonis non*, it will be presumed that the authority of the administrator in chief had ceased, when all the evidence on that subject is the transcript of the proceedings introduced (which does not purport to set out all the record of the administration in chief), showing merely the order appointing them; that they had filed accounts and vouchers for a final settlement; that the Judge of Probate was incompetent, and therefore transferred the account and settlement to the Register in Chancery, and that the latter more than a year afterwards appointed an administrator *de bonis non*.

APPEAL from Madison Circuit Court.**Tried before Hon. LEWIS WYETH.**

This was a suit brought by appellant, Benjamin F. Bean, as the administrator *de bonis non* of the estate of Lawson Garner, deceased, to enforce the payment of a certain bond executed by one D. L. Lakin, as principal, with the appellees, Reuben Chapman and Septimus D. Cabaniss as his sureties, on the 27th day of January, 1860, and payable to appellant's intestate twelve months after date. Lakin is not sued in this

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action. The defendants filed eleven pleas: 1. That they do not owe the debt; 2. Failure of consideration; 3. Payment; 4. That plaintiff is not and never has been administrator *de bonis non* of Lawson Garner; 5 and 6 pleas substantially the same as plea number 4. 7th, 8th and 9th, that as to the interest claimed on said bond from the 27th of January, 1861, to the 2d day of April, 1866, the defendants aver and plead that they signed said bond as the sureties of said Lakin, who was the principal obligor, and which fact was well known to plaintiff's intestate, that on the said 27th day of January, 1861, the said Lakin was a resident and citizen of the Territory of Kansas, and continuously so remained until the 2d day of April, 1866; that said Lawson Garner, plaintiff's intestate, was a resident and citizen of the county of Morgan, and State of Alabama, from the 27th of January, 1861, to his death in 1863, and that the plaintiff and his predecessor in office both resided in said county of Morgan; that the defendants were residents of Madison county, Alabama, which adjoined Morgan county, Alabama, between said dates and since; that from the 27th of January, 1861, to the 26th of April, 1866, war existed between the United States and the Confederate States, and all business intercourse ceased and was prohibited between the citizens of said sections; that the State of Alabama, in which plaintiff's intestate resided, adhered to and formed part of the Confederate States, while the Territory of Kansas in which said Lakin resided, adhered to and formed part of the United States, and that during that time neither plaintiff or his intestate had any agent within the limits of the United States who was authorized to receive payment from Lakin; that Lakin had no agent within the limits of the Confederate States who was authorized to pay said bond for him, and that, consequently, no interest could be claimed during that time. The 10th plea, after craving *oyer* of the letters of administration to Bean, set up, that before the date of said letters, the Probate Court of Morgan county had granted letters to Thomas D. Garner and Benjamin F. Bean, both of whom are now living and have never resigned, nor have they been removed from their administration, and their administration of said estate remains unrevoked and unrescinded by any order of said Probate Court. The 11th plea, after craving *oyer* of Bean's letters, sets up, that they are issued by H. A. Sharpe, Register in Chancery, sitting as Judge of Probate; and that he had no authority to grant said letters. The letters to Bean purport to be letters of administration in chief, and are granted by H. A. Sharpe, Register in Chancery, sitting as Judge of Probate of Morgan county, on the 2d day of August, 1871. Issue was

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taken on the 1st, 2d, 3d, 5th and 6th pleas. The fourth plea was demurred to as stating a conclusion of law, and the demurrer being overruled, the plaintiff filed a replication to the 4th, 10th and 11th pleas, which recited the appointment of plaintiff and one John D. Garner as administrators in chief, on the 24th day of November, 1863; that on the 6th day of June, 1870, the plaintiff and said Thomas D. Garner, as such administrators, filed their accounts and vouchers for a final settlement; that the Judge of Probate was incompetent to act in said settlement, on account of being the brother-in-law of said administrators, and that the court had ordered that the account and settlement be transferred to the Register in Chancery of Morgan county; that after said transfer of said administration, the plaintiff and said Thomas D. Garner resigned as such administrators; and on the 2d day of August, 1871, the said Register of said Chancery Court, sitting as Judge of Probate of said county of Morgan, appointed plaintiff administrator *de bonis non* of said estate, who gave bond and qualified according to law, and issued to plaintiff the letters set out upon *oyer* in the plea of defendants. Issue was joined on this replication. On the trial, the plaintiff offered in evidence his letters of administration, in connection with the records from the Probate Court of Morgan county, and from the Register in Chancery to whom the administration of plaintiff and Thomas D. Garner was transferred, to prove the fact that he was administrator *de bonis non* of the estate of said Lawson Garner. The record from the Probate Court set out the appointment of plaintiff and Thomas D. Garner, as administrators, on the 24th day November, 1863. The following record was also offered:

“State of Alabama, }
Morgan County. } Probate Court, June 6th, 1870.

This day came Benjamin F. Bean and Thomas D. Garner, administrators of the estate of Lawson Garner, deceased, and filed with the judge of said court their accounts and vouchers for a final settlement, and the judge of said court being incapacitated to act in the matter of said settlement on account of being a brother-in-law to said administrators; it is ordered that said account and settlement be transferred to C. C. NeSmith, Register in Chancery for the 6th District, Northern Chancery Division of the State of Alabama.”

Appended to this record was the following certificate:

“State of Alabama, }
Morgan County. } I, William J. Simpson, Register
Northern Chancery Division of said State, hereby certify

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that the foregoing is a full and correct copy of the order of the judge of said court, transferring the matter of the final settlement of Benjamin F. Bean and Thomas D. Garner, administrators of the estate of Lawson Garner, deceased, to the Register of the Chancery Court for the 6th Chancery District of Northern Chancery Division of the State of Alabama. I further certify that H. A. Sharpe was the successor of the said C. C. NeSmith, as Register of the Chancery Court as aforesaid.

Given under my hand, at office, in Somerville, this the 16th day of May, 1877. WILLIAM J. SIMPSON, Register."

To this evidence the defendants objected; the court sustained the objection, excluded the evidence, and the plaintiff excepted.

The plaintiff then offered said evidence, in connection with parol proof, that the said Benjamin F. Bean, who sues as administrator *de bonis non*, is the Benjamin F. Bean who is named as one of the administrators of the estate of Lawson Garner in the record from the Probate Court of Morgan county, and that the Judge of Probate of Morgan county, at the time of the transfer of the final settlement of plaintiff and Thomas D. Garner, as administrators, was their brother-in-law, and that he continued to be such Probate Judge up to and at the time said H. A. Sharpe issued letters to plaintiff. To the admission of this evidence, the defendant objected; the court sustained the objection, and plaintiff excepted.

The plaintiff demurred to the 7th, 8th and 9th pleas of defendant, on the ground that the facts set forth furnished no reason why the plaintiff should not recover the interest therein referred to. The court overruled the demurrer, and plaintiff excepted. The ruling on this demurrer appears in a separate entry from the judgment entered on the verdict of the jury, and the entry contains simply the action of the court on the demurrers. There was a verdict and judgment for the defendants, and the plaintiff brings the case here by appeal, assigning as error the various rulings to which exceptions were reserved.

L. P. WALKER, for appellant.—It is well settled that, where debtor and creditor reside in different countries which are at war with each other, that the creditor has not the right to demand or receive interest for the time the countries are at war; but it is equally well settled that if the creditor has an agent in the country with the debtor to whom money could be paid, the creditor can recover interest during the war. 7 Wall. 447; 1 Pet. 496; 3 Wash. C. C. 396; 4 Har. & McH. 116. When the debt falls due all become the principals.

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There can be no doubt that the sureties were liable to pay the debt on the default of their principal, and Garner could have sued the appellees during the war and compelled payment, and they could have paid the bond without any violation of law. Whenever payment can be lawfully made, and the debtor fails or refuses to pay, the unvarying rule is that the debt carries interest.—*Paul v. Christie*, 4 Har. & McHenry, 116.

Section 2647 of the Code of 1876 provides that, when a Probate Judge is incompetent, under the provisions of § 540 of this Code, to discharge any duty in reference to an executorship, an administration or guardianship, the Register in Chancery of the district in which the county of such judge is situated, must discharge that duty as if he were Judge of Probate. The transcript from the register's office shows that the Probate Judge was related to the administrators. The authority of the Probate Judge to transfer the cause, and the jurisdiction of the register to act, depended on the fact of the relationship of the Probate Judge to the administrators. This was the jurisdictional fact, and this fact the record showed. In this case no inquiry can be made as to whether this recital in the record is true or not. If the record, in a transferred cause, recites the jurisdictional fact which authorized the transfer, the recital is conclusive in a collateral proceeding.—*Wilson v. Wilson*, 36 Ala. 655; *Hooks v. Barnett*, 38 Ala. 607. All reasonable intendments must be made in favor of the regularity of the decree or judgment.—*Wyman v. Campbell*, 6 Porter, 219; *DuVall v. McClosky*, 1 Ala. 708; *Wyett v. Rambeau*, 29 Ala. 510; *Key v. Vaughan & West*, 15 Ala. 495.

As to the grant of letters of administration, the Probate Court is a court of general jurisdiction.—32 Ala. 676; 34 Ala. 694; 32 Ala. 353. In the cases in which the register has jurisdiction under the statute, he sits as Probate Judge, and has the same jurisdiction *pro hoc vice*. Although Bean's letters, issued by the register, purport to be in chief, the record shows there had been a former administration, and when necessary to sustain the jurisdiction in a collateral attack, the court will treat a grant of special administration as an administration *de bonis non*, when that is the only grant that could be made.—*Moseley v. Mastin*, 37 Ala. 216; see, also, *Ikleheimer v. Chapman*, 32 Ala. 676.

HUMES & GORDON, *contra*.—Interest on debts made previous to, and maturing during the war, ceased to run during the subsequent continuance of hostilities.—1 Amer. Lead. Cases, 528; *Brown v. Watts*, 15 Wall. 177; *Conn v. Penn*,

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1 Pet. C. C. 496; *Lash v. Lambert*, 15 Minn. 416. The bond sued on states, in its body, that Cabaniss and Chapman are mere securities, and the rule is universal which limits the liability of the sureties to that of the principal.—See Tell's Law of Suretyship and Guaranty, 123-4; Burge on Suretyship, 4; Theobald on Prin. and Surety, 43, § 82. The principle that, whatever discharges the principal discharges the surety, is of extended application, and it operates whenever anything is done which relaxes the *exact legal contract* by which the principal is bound, or, in anywise lessens, impairs, and delays the remedies which the creditor may resort to for its assurance or enforcement.—2 Danl. on Neg. Inst. 290, § 1312; Thompson on Bills, 390; 1 Parsons on Notes and Bills, 244. Whenever the principal debtor was liable to pay interest, his surety is also liable; but while he is thus held liable for all losses arising from his principal's default, he cannot be held liable for anything beyond the actual extent of said loss.—*DeGolyar v. Guar. & Suretyship*, 235-6. The mere fact that the surety cannot, if he pays the note, have an enforceable claim for what he pays, against the principal, defeats the holders claim against the surety.—1 Parsons on Notes and Bills, 245; see, also, 21 How. U. S. 66; 9 Wheat. 680; 12 Wheat. 511; 15 Peters, 187; 2 Wall. 235; 7 Cranch, 69; 4 Wall. 186. These principles are sustained by decisions from the courts of last resort of nearly all the States.

The evidence offered by the plaintiff fails to show that there was any vacancy in the administration of the estate of Lawson Garner, and if there was no vacancy, the appointment of an administrator *de bonis non* is void.—36 Ala. 559; 27 Ala. 273; 18 Ala. 34; 40 Ala. 155; *McDowell v. Jones*, 58 Ala. 156. And a judgment in favor of an administrator *de bonis non* will be annulled.—45 Ala. 613. It was necessary for the plaintiff to show, by record, evidence that there had been a transfer and a resignation of the administrators in chief, before any one could make an order appointing an administrator *de bonis non*. The oral proof offered was clearly inadmissible; it was both irrelevant and secondary. The plaintiff was bound to prove that he was administrator *de bonis non*, and he had the laboring oar; this court, rather than indulge the presumption of a vacancy in favor of appellants, will indulge the presumption of affirmative proof having been made below of no vacancy, the record not setting out all the evidence, and that presumption being in favor of the appellees.

STONE, J.—As we read this record, the ruling of the Circuit Court on the demurrers, is shown in the judgment entry.

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Not in the final judgment, it is true ; but the ruling was entered on the minutes, in a separate, independent entry. It is found on the 19th page of the transcript, and is in all respects formal, except that it contains only the judgment on the demurrer. Courts frequently pronounce judgment on demurrers before the cause is taken up for final trial. Sometimes this is done at a different term of the court. There is no irregularity in this. Our ruling is, that judgments on demurrer, to receive consideration of this court, must appear of record ; must be entered on the minutes. The present record comes up to the rule, and its effect is not impaired by the unnecessary exception reserved to the ruling of the court thereon.

Under the facts of this case, the flagrancy of the recent war between the sections did not stop the running of interest. The plaintiff and defendants in this suit, at no time sustained the relation of alien enemies to each other. During the entire prevalence of that fierce conflict, they inhabited co-terminous counties in this State. The plaintiff could at any time have received payment from the defendants, and the defendants could at any time have paid the plaintiff, without violating any rule of law. The whole theory on which interest and the statute of limitations stand still during hostilities, rests on the stern non-intercourse which public law requires of nations or peoples at war with each other. It is a public quarrel, in which every individual on the one side, whether combatant or non-combatant, is conclusively classed as the enemy of every individual on the other side. These shall have no commercial intercourse with each other. Bean and his intestate, Garner, were never alien enemies to Chapman or Cabaniss. At any time suit could have been prosecuted on this cause of action between these parties, and the money due, with interest, might have been coerced out of these defendants, even before the close of the war. The case of *Paul v. Christie*, 4 Har. & McH. 161, is not distinguishable from this. It was there held that the plaintiff was entitled to full interest, notwithstanding the war. We think that decision rests on impregnable grounds. We do not, in this, gainsay the doctrine, that "as soon as a war is commenced, all trading, negotiation, communication or intercourse between the citizens of this country and the enemy, without the permission of government, is unlawful."—*Griswald v. Waddington*, 16 Johns. 438 ; *Brown v. Hiatts*, 15 Wall. 177 ; *Semmes v. Hartford Ins. Co.*, 13 Wall. 163 ; *Conn v. Penn*, Pet. Cir. Ct. Rep. 496 ; *Denniston v. Imbrie*, 3 Wash. Cir. Ct. 396 ; 1 Am. Lead Ca. 528. See, also, *Lash v. Lam-*

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bert, 15 Minn. 416. What we decide is that this case does not fall within the rule.

It is contended for appellees that, being only sureties, their liability is accessorial, and that they can not be held for a greater sum than their principal, Lakin, is liable to pay. The foregoing is certainly the rule in a proper case. Whenever the inquiry is one of original liability, the surety can not be held to a greater extent than the principal is bound for. The principal's obligation defines the boundary upward, beyond which the surety's obligation can not be carried. So, the creditor can do no act by which he reduces the principal's liability, without, at the same time, reducing the surety's liability, at least, to the same extent. But the rule is very different where the law reduces or absolves the principal's liability, without the fault or procurement of the creditor. In such case the principal's defense is personal, and does not affect or impair the surety's liability, unless he also have a personal defense. Discharge of the principal in bankruptcy, statute of limitations, or, if he be dead, failure to present or file the claim against his estate within the time required by law, are of this class.—*Minter v. Br. Bank*, 23 Ala. 762; *Hooks v. Br. Bank*, 8 Ala. 580; *Cawthorne v. Weisinger*, 6 Ala. 714; *Woodward v. Cligge*, 8 Ala. 317. In such cases the surety can pay the debt at any time after it matures, and then proceed against the principal for money paid for his use, and at his request. Whether if the present defendants pay this debt, they can not recover of Lakin, their principal, the whole sum they have to pay, including interest, is a question we need not here discuss. The Circuit Court erred in overruling plaintiff's demurrer to the 7th, 8th and 9th pleas of defendants.

Our statutes have made provision for the transaction of probate business, when the Judge of Probate is incompetent to sit by reason of interest, relationship, &c., under section 540 of the Code of 1876. Section 2648 declares that "when a Probate Judge is incompetent under the provisions of section 540 of this Code, to discharge any duty in reference to an executorship, an administration, or guardianship, the Register in Chancery of the district in which the county of such Judge is situated must discharge that duty, as if he were Judge of Probate.—§ 2648. Such Register must discharge such duty in the Probate Court without the removal of the original papers or records from such Probate Court; and all orders, decrees and judgments therein made by such Register, may be appealed from, revised and enforced, as if they were the orders, decrees or judgment of such court."

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In *Wilson v. Wilson*, 36 Ala. 655, rules are laid down which, we think, settle the most material questions arising on this branch of this case. The Judge of Probate of Morgan county, the county in which Bean's administration of Garner's estate is alleged to have been had, certified that he was brother-in-law both to Bean and to Garner, his co-administrator; and he made an order, transferring the account and settlement to the Register in Chancery of that county. This, if properly shown to the Circuit Court, divested the jurisdiction of the Judge of Probate, and clothed the Register in Chancery of that county with all probate jurisdiction of that administration, so long as the disability of the Probate Judge continued. We judicially know who are and have been Probate Judges at any given time, and we know that the same person was Probate Judge when the order of transfer was made June 6th, 1870, and when the Register issued the letter of administration to Bean, August 2d, 1871. Hence, the order of transfer of the Judge of Probate, if properly shown, proves that the Register in Chancery of Morgan county was the proper officer to appoint Bean, the brother-in-law of the Judge of Probate, to the administration of Garner's estate. No new certificate of disqualification was necessary.

But the Register should have discharged that duty "in the Probate Court," and the record of the appointment should have been made in that court. It did not pertain to the Chancery Court. Under the statute, the case is not transferred to the Chancery Court, nor to the Register of that court, as Register. The Register becomes Judge of Probate *pro hac vice*. His action becomes the act and record of the Probate Court, and the record is required to remain in the Probate Court. When necessary to have a transcript of the record, it is certified from the Probate Court, not the Chancery Court. The Register's certificate of such order, made as Register in Chancery, gives it no authority whatever; for, as to this service, thus pronounced, he is a private person. The Judge of Probate was the proper officer to certify the transcript in this case; and, on this ground, without considering any other, the Circuit Court did not err in rejecting the transcript. There is perhaps another ground which required its rejection. It assumed to certify what did not appear of record, namely, that H. A. Sharpe was the successor of C. C. NeSmith. The order of transfer was not so certified as to make it legal evidence.

If the order of transfer had been legally shown, then, as we have stated above, the jurisdiction of the Register to discharge this particular "duty in the Probate Court," would be made out. The matter of performing the duty "in the Pro-

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bate Court, without the removal of the original papers or records from such Probate Court," would be a question of regularity at most, which would not avoid the proceedings, presented collaterally, as the question comes before us in this case. It thus became a question in the court below, of proving the order of transfer by legal evidence. We have shown above that the offer made in this case did not come up to the rule, and the Circuit Court did not err in its rejection.

It is contended that the appointment of Bean was void, because the record shows the prior appointment of Bean and Garner as administrators in chief, and does not show their authority had ceased. The record of the administration in chief is not pretended to be set out in this transcript. All that is attempted to be shown is, the appointment of Bean and Garner to the administration in chief, the order of the Probate Court, reciting that they had filed an account and vouchers for final settlement, that the Judge of Probate was "incapacitated to act in the matter of said settlement on account of being a brother-in-law to said administrators," and transferring said account and settlement to the Register in Chancery; and the letter of administration to Bean, issued about a year afterwards, by the Register in Chancery. The filing of the account current for final settlement indicates that Bean and Garner, as administrators, proposed to make final settlement, and to be relieved of the trust. Bean was appointed to the same trust more than a year afterwards. Presented collaterally as this question is, and in the absence of all information other than that referred to above, we hold that, if the order of transfer were legally shown, it would be our duty to presume the authority of the administrators in chief had terminated legally, before the Register committed the administration to Bean.—*Spright v. Knight*, 11 Ala. 461; *Ragland v. King*, 37 Ala. 80; *Cogburn v. McQueen*, 46 Ala. 551; Code of 1876, § 2376.

Reversed and remanded.

BRICKELL, C. J., not sitting.

[Ex parte Opdyke, Terry & Steele.]

Ex parte Opdyke, Terry & Steele.

Application for Mandamus.

1. *Mandamus; when will not lie.*—While the statute, authorizing the garnishee to set up in his answer the claim of a third person, and providing the mode in which such claimant may contest with the plaintiff the right to the debt, contemplates that the claimant will appear at the term of the court to which he is cited and then propound his claim, there is nothing in the terms or purposes of the statute which excludes the power of the court to enlarge the time of propounding the claim or to continue the cause, with leave to propound the claim at a succeeding term. Whether or not this shall be done must be left to the sound discretion of the court, and the exercise of that discretion will not be controlled by *mandamus*.

This was a motion for a *mandamus* directed to the Circuit Court of Henry county, compelling that court to render judgment in a certain cause pending therein.

The facts may be stated as follows: At the Spring term, 1876, of Henry Circuit Court, Opdyke, Terry & Steele recovered a judgment against one Henry Wechsler, and soon after garnishment on said judgment was issued against M. W. Kelly & Bro., and at the Fall term, 1876, they answered, admitting an indebtedness, evidenced by two promissory notes, and disclosing that one of these notes was claimed by one A. Cohen, a citizen of New York, and the other by one Isaac Stuerman, who resided in the city of Eufaula. Thereupon the court ordered notice to be served on Stuerman and publication to be made as to Cohen, and the cause was continued. At the Spring term, 1877, the garnishees obtained leave to file an amendment to their answer, suggesting that since the filing of their answer they had been notified that Cohen had transferred the note held by him to one Levi Morris, also a citizen of New York, and that John McNab had become the owner of the note formerly held by Stuerman. Upon the filing of this amendment, the court ordered notice to be served on McNab, and Morris appeared by attorney, and the cause was continued. At the Fall term, 1877, when the case was regularly reached, no claim had been filed by any person to either of the notes, and the plaintiff moved for judgment. The court refused the motion, and at the instance of the attorney for Morris granted him further time to answer, and the plaintiff excepted. Henry R. Shorter, as the attorney of Morris, then filed a claim, verified by himself, to said note.

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To this the plaintiff objected, on the ground that the claim was not properly verified, and again moved for judgment against the garnishees as to the note claimed by Morris, but the court refused to give them judgment and admitted the claim of Morris, as verified by his attorney, to the files, and plaintiff excepted.

The business not being disposed of at the regular Fall term, 1877, the court ordered an adjourned term to be held on the following week. At this adjourned term, Stuerman appeared and filed with the clerk of the court his claim to the note, without the knowledge or consent of the plaintiffs. At the Spring term, 1878, the plaintiffs made a written motion to strike from the files the claims of Stuerman and Morris respectively, on the ground that they were not propounded within the time prescribed by law, and for judgment against the garnishee. After the adjournment of the Fall term, 1877, and before the commencement of the Spring term, 1878, Morris had, in vacation, filed a claim verified by himself. The court struck the claim of Morris, verified by his attorney, from the files, and refused to strike out his claim as verified by himself and filed in vacation, or to strike out the claim of Stuerman, and refused to give judgment for the plaintiffs. The plaintiffs now apply to this court for a *mandamus* to compel the Circuit Court to render judgment in their favor, and to strike from the files the claims of Morris and Stuerman.

WILLIAM C. OATES, for the motion.

HENRY R. SHORTER and JAMES L. PUGH, *contra*.

BRICKELL, C. J.—When a garnishee by his answer, or after answer and before judgment thereon, alleges that he has been notified a third person claims the debt owing by him, or the property in his possession, which it is sought to reach by the garnishment, it is the duty of the court to suspend proceedings, and cause a notice to issue to such third person to come in at the next term of the court and contest with the plaintiff the right to the debt or property.—Code of 1876, § 3301. On the appearance of such claimant he must, in writing and under oath, propound his claim, and an issue of law or fact must be formed between him and the plaintiff in the garnishment.—*Ib.* § 3303. It is optional with such claimant whether he will enter into a contest with the plaintiff; the court can not compel him into it. All that the court has power to do, if he does not propound his claim, is to spread his default on the record, and proceed to judgment

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as if the existence of the claim had not been suggested.—*Evans v. Norman*, 14 Ala. 662. When he propounds his claim, and an issue is formed between him and the plaintiff, while it is collateral to the garnishment proceeding, it is in many respects a distinct and independent suit, and from the judgment rendered therein an appeal lies, the parties to which are the plaintiff and claimant only; and in the costs which may be incurred, the defendant in the judgment or attachment, and the garnishee, are without interest and without liability.

The writing verified by the claimant serves the purposes of pleading, and the burden of proof rests upon him to support it.—*Camp v. Hatler*, 11 Ala. 151. Though the statute contemplates that the claimant will appear at the term of the court to which he is cited, and will then propound his claim, there is nothing in its terms which excludes the power of the court to enlarge the time of propounding the claim, or to continue the cause, with leave to propound it at a succeeding term. Such power the courts of this State have exercised since their organization, and it is essential to the proper administration of justice that they should be clothed with it. The matter rests in the sound discretion of the court, and its action is not revisable.

Preceding sections of the same article of the Code authorize the plaintiff or defendant in the garnishment, to controvert the answer of the garnishee at the term it is made; and an issue must be formed under the direction of the court, stating the particulars in which the answer is averred to be untrue.—Code of 1876, §§ 3299–3300. These are pre-existing statutory provisions re-enacted in the Code. The constructions which they have received, is, that the answer must be controverted at the term it is made. But it is apparent, when the cases are carefully examined, that it was not intended to deny the court had power, by an order, to enlarge the time for controverting the answer and forming the issue. *Graves v. Cooper*, 8 Ala. 811; *Lockhart v. Johnson*, 9 Ala. 223; *Marston v. Carr*, 16 Ala. 325. It would be an anomaly in the practice of the courts, which the statutes were not intended to produce, to disaffirm in case of a claimant in a garnishment proceeding, the power of the court recognized in all other proceedings, to enlarge the time of pleading to the merits, and to continue causes that such pleading may be introduced. The exercise of the power rests, as we have said, in the discretion of the court, and its action is not revisable. The application must be overruled.

[Memphis & Charleston Rail Road Company v. Lyon.]

Memphis & Charleston Rail Road Company v. Lyon.

Action for Killing Live Stock.

1. *Evidence; what irrelevant.*—In an action against a railroad company for killing live stock, at a locality not at or near any depot, road-crossing, town, or other place where the statute requires the whistle to be blown, speed reduced, &c., the inquiry whether or not the engineer, after having run one or more trips, afterwards, could remember at what points, including depots, road-crossings, and towns though which he passed, he blew the whistle, rang the bell, &c., is irrelevant.

2. *Railroad company; for what damage not responsible.*—A railroad company acquiring a right of way over lands, is not bound to plank or cover a culvert or drain, so as to prevent cattle from getting fastened therein; and is not responsible for the killing by its trains of cattle thus fastened, if it be shown that the company was duly diligent to prevent its trains from injuring them.

3. *Same; what negligence in.*—It is negligence in a railroad company to run its trains on a straight track in the night time at such a rate of speed that the train cannot be stopped in the distance at which the engineer can see cattle, or other obstructions on the track, by the aid of the head-light.

4. *Same; when negligence vel non, question for the jury.*—Where the distance to which the light was thrown by the head-light, which was in proper order and of the best kind in use, is not shown; but only that the engineer could not perceive by its light, at thirty yards distance, a young mule of the color of the earth about a culvert in which it was fastened, and could not stop in forty yards distance, and there is no evidence as to how much of the mule was above the track; it is not error to charge the jury that it was negligence to run the train at a rate of speed at which the engineer could not stop before reaching the mule after seeing it was on the track. Whether or not this was negligence was a question for the jury, in view of all the facts, under appropriate instructions from the court.

APPEAL from Jackson Circuit Court.

Tried before Hon. LOUIS WYETH.

The appellee, David M. Lyon, brought this action against the appellants, the Memphis & Charleston Rail Road Company, to recover damages for the killing of a mule by the cars.

On the trial, after the plaintiff had proved the ownership, value, and the killing of the mule, the appellants introduced the engineer of the train, by which the mule was killed, and he testified, that according to the rules of the company, he made a report of the killing of this mule on his return from the trip on which the accident occurred, and that he had looked at this report, which was filed in the office of the company shortly before testifying in this case. Witness further testified that the mule was fastened between the cross-ties, which were laid on stringers across a water cul-

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vert, which was open at the top and not covered, except as crossed by the superstructure of the road, and five or six feet deep; that he did not see the mule until his train, which was a passenger train, and running at the rate of twelve miles an hour, was within about thirty yards of the culvert in which he was fastened; that the mule was a small one, and just the color of the earth which was thrown up on each side of the culvert; that it was impossible to stop a train, such as the one which caused the accident, in less than forty yards, when running at the rate of twelve miles an hour; that as soon as he discovered the mule he made use of all the means in his power known to skillful engineers, such as applying the brakes and reversing the engine, but was unable to stop the train until the mule had been killed. The witness further stated that the accident occurred about midnight, and that the head-light to the engine was as good as any used on any railroad at the time, and that it was in good condition at the time, properly trimmed and burning, and that he was unable by his head-light to discover or observe the mule, situated as he was at a greater distance than thirty yards. It was shown that the accident did not happen near any depot, road-crossing, town, or other place at which the statute requires the bell to be rang, the whistle blown, or the speed reduced. On cross-examination the engineer was asked, by the plaintiff, the following question: "Can you state after having run one of these trips, at what particular points, including depots and other road-crossings and towns through which you pass, you rang the bell and blew the whistle, and did all these things which are required of engineers in driving trains from Stevenson to Memphis." The defendant objected to this question, but the court overruled the objection and required the witness to answer, and the defendant excepted. The witness then answered "that he could not." To this answer the defendant also objected, and the court overruled the objections, and the defendant excepted.

This was, in substance, all the evidence, and the court, among other things, charged the jury, "That if the defendant did not furnish the engine with such a head-light as would enable an engineer to have seen said mule and obstruction not more than thirty yards ahead, then the defendant should not run its train faster than would enable those in charge of it to stop before going that distance, that not having a light by which the engineer could see said mule and obstruction more than thirty yards, the running of the train at such a speed as would prevent its stopping in less than that distance would make the defendant liable for the dam-

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ages resulting from such a cause. To this charge the defendant excepted.

The court further charged the jury, that the failure of the defendant to cover the cross-ties of the culvert to prevent stock from falling into and getting fastened in it, was such negligence as would make the defendant responsible for the damages resulting from the killing of plaintiff's mule, if fallen into or fastened in the culvert. To this charge the defendant excepted.

The plaintiff then asked the following written charge: "That, if the jury find from the evidence that the engineer running the train of cars that killed the mule, which is the subject of this litigation, could not perceive, by reason of the character of the head-light, and it being in the night time, an obstruction on the road at a distance greater than thirty yards, and that it was impossible to stop said train of cars at a shorter distance than thirty-five or forty yards, when said train of cars was going at the rate of twelve miles an hour, and that said train was running at the rate of twelve miles an hour, then the killing was the result of negligence, and they will find for the plaintiff." The court give this charge, and the defendant excepted.

The defendant then asked the following written charges: "1. If the jury find from the evidence that the head-light of the engine which ran over the plaintiff's mule, was the same kind of head-light in use by the railroads at the time generally, and that the light was in good order, then because the light did not enable the engineer, when the train was in motion, traveling at the rate of twelve miles an hour, to see the mule so far ahead as the train would go before it could be stopped, does not make the defendant liable for the killing of plaintiff's mule. 2. A railroad has a right to the free and uninterrupted use and enjoyment of its road-bed. The right is the same in character and degree that the owner of land has to the exclusive use and occupation of his premises; and if the mule of plaintiff strayed on the track of the defendant, and got fastened in a water culvert, and whilst there the train came along at or near the hour of midnight, at its usual speed, and the mule could not be seen by the engineer in time to stop the train by putting on brakes and reversing the engine before running over it, then the verdict of the jury must be for the defendant." The court refused to give each of these charges, and the defendant separately excepted. The overruling of the objection of defendant to the question of plaintiff to the engineer, the charges given and the refusal to charge as requested, are now assigned as error.

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HUMES & GORDON, for appellant.

ROBINSON & BROWN, *contra*.

MANNING, J.—A yearling mule belonging to appellee, having fallen into a wooden drain, called by the witnesses a culvert, open at the top, between the cross-ties laid upon stringers on appellant's railroad, was run over and killed by a locomotive hauling a train of passenger cars in the night time. The engineer made a report of the accident at the conclusion of the trip, to the company, as it was his duty by its rules to do, and after reading it over, he testified, on the trial of this suit brought by the owner of the mule to recover damages of the company, clearly and unambiguously in regard to the circumstances of the casualty. The accident did not happen near any depot, road-crossing, town, or other place at which the statute requires the observance of certain regulations prescribed by the legislature, such as blowing a whistle, ringing a bell, or reducing the speed of the train, in order to prevent the occurrence of such accidents. The first question, therefore, asked of the witness on cross-examination, and his answer in the negative to it were not relevant and should not have been excluded. Whether the witness, after having run one of his trips, was able or not to "state at what particular points, including depots and road-crossings and towns through which" he passed, he "rang the bell and blew the whistle and did all those things which are required of engineers in driving trains, from Stevenson to Memphis," was matter that could not shed light on the subject under investigation. The circumstances attending the casualty complained of would naturally make a much deeper and sharper impression upon the memory, than the particulars of an ordinary trip during which nothing unusual had happened, and of which no report need be made.

The drain or culvert referred to was open at top, not covered, except as crossed by the superstructure of the railroad; and the court charged that "the failure of the defendant to cover the cross-ties of the culvert, to prevent stock from falling into or getting fastened in it, was such negligence as would make the defendant responsible for the damages resulting from the killing of plaintiff's mule, if fallen into or fastened in the culvert." This was erroneous. A company authorized to build a railroad on land in which it acquires a right of way, is entitled to the exclusive use of the road when built for the service of the public. It may be made, as such structures usually are, with culverts, upon trestle work, along steep embankments or near the edge of a precipice. And as

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it is constructed only for the locomotives and cars of the company to run on, and not to be used as an ordinary highway, for the passage of persons or animals, it is not incumbent on the company to provide against accidents to them, by laying floors or erecting railings or other safe-guards at such dangerous places. The laws of this State do not require that either a railroad, or the lands of individuals, shall be so fenced about and enclosed that domestic animals going at large cannot get upon them. Of course, though, the owners of such unenclosed property would be liable for damages resulting from any violence they should do to live stock straying thereupon, whether produced by acts wilfully, or only negligently committed. But it does not follow that they must take upon themselves the care or protection of such wandering stock, or that, through fear of doing hurt thereto, they must refrain from using their own premises in a lawful manner, beneficially for themselves. The owners of animals that are turned out to go at large—"in the range"—must bear the loss that may come to them from any mere accident not attributable to the positive misconduct or carelessness of another person. Our statute, however, provides that "when any stock is killed or injured, or other property is damaged or destroyed by the locomotive or cars of any railroad, the burden of proof in any suit brought therefor, is on the railroad company to show that the requirements" prescribed by law, to prevent such accidents at road-crossings, depots, and other specified places along the railroad were complied with, that is, if the accidents occurred at such places; and that wheresoever they happened, they were not caused by negligence on the part of the railroad company.—Code of 1876, § 1700 (1401); *M. & O. R. R. Co. v. Williams*, 53 Ala. 597; *Mobile & Montgomery Ry. Co. v. Blakeley* (in MS). But the enactments which purport to make any railroad company of this State liable for live stock or cattle injured or killed by its cars or locomotives, though done without any fault or neglect on the part of said company or its agents, have been adjudged to be in conflict with the constitution of the State and void.—*Zeigler v. South & North Ala. R. R. Co.* (in MS.)

The evidence at the trial tended to show that, although the head-light of the locomotive was of the best kind then in use on the railroads of the country, and was well trimmed and in good order, yet it did not enable the engineer to see the mule until the locomotive was within thirty yards of it; that the train was then running at the rate of twelve miles an hour and could not be stopped within a distance short of forty yards; that the mule was small and of the same color as the earth near it, and between the cross-ties which were laid upon

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stringers across the culvert, and that the culvert was some five or six feet deep. The court charged the jury that, if defendant did not furnish the engine with such a head-light as would enable the engineer to see said mule more than thirty yards ahead, then the running of the train at such a speed as would prevent its stopping in less than that distance, would make the defendant liable for damages resulting from such a cause.

The idea at the bottom of this charge, is probably correct. Those who employ the tremendous yet easily controllable power of steam-engines on railroads, must be vigilantly careful to avoid committing with them, the destruction they are capable of effecting; and due care to this end, is not observed when a train is run thereon at such speed that it cannot be stopped within the limit at which the engineer can plainly see upon a straight track an object of the size of a man or a young mule thereon. We say on a *straight track*, because the statute prescribes the precautions to be observed where it is curved. Of course, though, we do not mean to intimate that the engineer must begin to stop a running train whenever he perceives in the distance a person or animal upon the track, through fear of hurting such person or doing an injury to the owner of the animal. Management of that kind would greatly impair the usefulness of railroads, and prevent their due connections with other roads. And the engineer is certainly justified, in presuming that living beings will get out of the way of his train when they can easily do so. The law on this point was explained in *Tanner v. Nashville & Decatur R. R. Co.*, (in MS.) and need not be here repeated.

But the mule colt, the subject of this suit, must have been in a great degree hidden from sight. How far the track was lighted up by the head-light, does not appear. The proof is only, that it did not enable the engineer to see the animal, situated as he was in the culvert. Nor was it shown how much of him was visible above the track. Perhaps it was only his struggling to get away from the approaching train, that brought him into view. If the track was well lighted a much greater distance by the head-light, but the mule by reason of his situation, could not be seen until the locomotive was within thirty yards of him, and it could not be stopped within a shorter distance than forty yards, certainly neither the railroad company, nor the engineer would be in fault for the misadventure of killing the animal. And the Circuit Judge manifestly erred in undertaking to declare as matter of law, that it was negligence to run the train at a speed from which the engineer could not bring it to a stand

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still within the distance at which he could under the circumstances, see this mule in a culvert, or partly in a culvert of the railroad. The question of the negligence or not, should, with proper instructions by the judge as to the law, have been left to the jury to decide upon the evidence.

Let the judgment of the Circuit Court be reversed and the cause be remanded.

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Real Action in Nature of Ejectment.

1. *Ejectment; what necessary to maintain.*—A purchaser of lands at a sheriff's sale, cannot maintain ejectment, unless he shows a valid judgment supporting the execution; and no such judgment can operate as authority to sell unless it proceeds from a court having competent jurisdiction, not only as to the subject matter, but also of the person whose estate it is the purpose of the sale to divest.

2. *Statutory separate estate of wife; mode of enforcing liability of, for necessities.*—The liability of the statutory estate of the wife for necessities, is the creature of statutes, which provide not only its extent, but the mode of its enforcement, and they authorize a sale of the wife's estate only after personal notice to the wife, as provided in the statute.

3. *Same; jurisdiction to order sale of; how acquired.*—The jurisdiction of the court to order such sale, though the proceeding has many of the characteristics of a proceeding *in rem*, is acquired by personal notice to the wife, and not by the seizure of her estate; and a levy of attachment on her estate is not notice to her, either actual or constructive, in the mode provided by statute.

4. *Same; what judgment does not authorize sale of.*—A judgment rendered by default, without personal notice to the wife, on a levy of an attachment on her statutory estate, is void as to her, so far as it condemns her statutory estate, and a purchaser at the sale under it acquires no title, and cannot maintain ejectment.

APPEAL from Coffee Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

This was a real action under the Code, brought by the appellee, J. P. Blue, against the appellant, Thomas Cauly, to recover certain lands. The appellee claimed title by virtue of a sheriff's deed to the premises, and to support this deed he offered in evidence a judgment rendered in his favor in a suit against Robert J. and Delila Blair. This suit was commenced by attachment, which was levied on the lands in question as the statutory separate estate of Delila Blair. The judgment entry recites, that "it appearing to the court that due and legal notice of the issuing of said attachment has been given the defendant, this day came the plaintiff, by his attorney, and the defendants being called, came not, but

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made default;" and the jury, having found that the statutory separate estate of said Delila was liable for the debt sued for, a judgment was rendered for the amount claimed, and an order made to sell the lands in controversy as her statutory separate estate. At the sale, under this judgment, the appellee became the purchaser.

The appellant objected to the introduction of this judgment in evidence, on the grounds: 1st. Because the proceedings on their face show that Delila Blair was a married woman, and the lands sued for was a part of her statutory separate estate. 2d. Because said proceedings showed on their face that it was a proceeding by an attachment against the separate statutory estate of a married woman. 3d. Because the proceedings fail to show that Delila Blair had any notice as required by law to subject the statutory separate estate of a married woman. 4th. Because the proceedings show upon their face that they are void so far as the separate statutory estate of Delila Blair was concerned.

The court overruled these objections, and allowed the judgment to be read to the jury. The ruling is now assigned as error.

W. D. ROBERTS, for appellant.

J. E. P. FLOURNOY, *contra*.

BRICKELL, C. J.—A purchaser of lands at a sale by a sheriff, to maintain an action of ejectment, must show the judgment on which the execution issued, under which the sale was made. It is the foundation of the authority of the sheriff to sell, without which his deed is of no more force than that of a stranger having no estate in the premises. *Lewis v. Gognette*, 3 St. & Port. 184. The judgment cannot operate as authority to the sheriff to sell, unless it proceeds from a court of competent jurisdiction—jurisdiction not only of the subject matter, power to render the particular judgment, but jurisdiction also of the person against whom the judgment is rendered and whose estate it is the purpose of the sale to divest.—*Webster v. Reid*, 11 How. 437. In courts of law, under our statutes, jurisdiction of the person is acquired by personal notice, actual or constructive, or an attachment issuing against and levied on the estate or effects of the defendant. An attachment is a statutory remedy, extraordinary in its character, in derogation of the common law, and a judgment founded on its levy is void, if it appears to have been issued by an officer not having authority to

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issue it.—*Stevenson v. O'Hara*, 27 Ala. 362; *Matthews v. Sands*, 29 Ala. 136.

The judgment, on which the plaintiff in the Circuit Court relied to support his title, was rendered against a married woman, condemning her statutory separate estate to sale, in a suit commenced by attachment levied on the estate. The question is, whether the judgment is void or merely voidable. Mere irregularities, mere errors in its rendition, which would be ground of reversal in an appellate tribunal, will not affect the validity of the sale by the sheriff. The judgment must be void; it must be apparent on its face, that the court was without jurisdiction to render it, or the title of the purchaser will not be vitiated. The judgment is not against the person of the wife—it is a judgment condemning her statutory separate estate to sale, and has more of the qualities and characteristics of a judgment *in rem*, than of a judgment *in personam*.—*Ravies v. Stoddart*, 32 Ala. 599. The jurisdiction of a court of common law, to render such a judgment, is statutory; it is not inherent in the court, and is not derived from the common law.

The statute which is supposed to confer the jurisdiction, is that which subjects the wife's statutory separate estate to liability for necessities for the family. Code of 1876, §§ 2711, 2712. The remedy which is to be pursued to establish judicially the liability of the estate, and to authorize its condemnation, is prescribed by the statute—a suit against husband and wife jointly, or a suit against the husband alone, prosecuted to judgment and return of execution *no property found*, and a motion to the court for an order of sale, of which the wife must have notice. Personal notice to the wife, and nothing less, will satisfy the requirements of the statute. The notice may be actual, or constructive, if she resides in the State; if must be by service of process; and if she resides without the State, it may be given her by advertisement in the mode directed by the statute. But personal notice, whether given in the one mode or the other, is an indispensable element of the jurisdiction of the court to pronounce the judgment of condemnation against her statutory separate estate. As we have said, the judgment in its qualities and characteristics, is rather *in rem* than *in personam*; but jurisdiction to render it is acquired not by a seizure of the *res*, but by personal notice to the wife. It would not be consistent with the terms of the statute which creates the estate, define its incidents, and declare its liabilities, to permit a seizure of the estate to take the place of personal notice to the wife. While the title to the estate by the declaration of the statute, remains in her, and cannot be

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divested by any act of the husband, or of husband and wife jointly, except by sale and conveyance they are enabled to make, the husband has the possession, management and control of it.—Code of 1876, § 2706. It could be seized by judicial process, without the knowledge of the wife; and if that seizure would authorize a judgment condemning it to sale, her title could be divested by a judicial proceeding of which she had no notice—of which, there could be no just ground to impute to her constructive notice. The seizure would not disturb her possession, or displace her control and management of the estate. It would operate only on the possession of the husband, and in justice could be notice to him only.

The uniform construction which this statute has received, is, that the estate of the wife can be subjected to sale only by a pursuit of the remedy it provides. The jurisdiction it confers on the court, as to the estate of the wife, is special and limited.—*Rodgers v. Brazeale*, 34 Ala. 512; *Carter v. Wann*, 45 Ala. 343; *O'Connor v. Chamberlain*, 57 Ala. 157. The action of the court in the exercise of this jurisdiction, cannot be supported, even when its validity arises collaterally, unless it affirmatively appears the essential requirements of the statute have been observed.—*Foster v. Glagner*, 27 Ala. 391; *Gunn v. Howell*, *ib.* 663.

In *Wright & Wife v. Snedecor*, 46 Ala. 92, the court passed as unnecessary for a decision of the cause, the question, whether an attachment would lie to enforce the demands chargeable under the statute on the wife's statutory separate estate. The question is now directly presented, and a decision is necessary to the determination of the right and title the appellee acquired by his purchase at the sale by the sheriff. Unless otherwise expressly provided, an attachment is a remedy for the enforcement of personal contracts and liabilities, not mere charges or liens on property, whether created by contract or by law. There is no contract binding the wife personally—no debt due from her. There is simply a charge on her statutory estate created by law; and there is no authority for the levy or seizure of the estate until the charge has been declared in amount and extent, and the estate subject to it, ascertained by the judgment of a court of competent jurisdiction, in a proceeding of which the wife must have notice. The levy of the attachment on her estate, and its issue against her personally, are not warranted by law, and are absolutely void.

It appearing from the record of the judgment, that it was rendered by default, without personal notice to the wife, on a levy of an attachment on her statutory estate, the judgment is void as to her, so far as it condemns her estate, and

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the objections to its introduction in evidence ought to have been sustained.

For the error in overruling these objections, the judgment is reversed and the cause is remanded.

Ware, Register, v. McDonald.

Appeal from Order Granting Mandamus.

1. *Wife's separate estate; what decree subjects.*—A decree of the Chancery Court, appropriating moneys, arising from a sale of lands of the separate estate of a married woman, under a former decree in the cause, which had been reversed, is a decree “subjecting to sale” the separate estate of a married woman, as much as if the court had ordered a sale of the lands themselves.

2. *Code of 1876, § 3930 construed.*—The fact that a married woman is “a free dealer,” and authorized to contract as a *femme sole*, will not exclude her from the benefits of the statute (Code, § 3930,) authorizing married women to appeal from decrees or judgments subjecting their separate estates, without giving security for costs.

3. *Appeal; when allowance of, compelled by mandamus.*—A party against whom a decree is rendered, is entitled to an appeal as matter of right; and where the appeal is denied, and its allowance is sought to be compelled by *mandamus*, the court, in determining the application, will not look to the probable result of the appeal.

4. *Refusal of Register to make out transcript; remedy for.*—Where the Register in Chancery refuses to make out and send up the transcript of the record in a chancery cause on appeal, application should be made to the Chancellor or to this court, for appropriate orders to have the transcript sent up.

5. *Register in Chancery; power of Circuit Judge to control official action of.*—A Circuit Judge has no authority to control the Register in the discharge of his duties in reference to causes in Chancery Court, and there is no necessity for a resort to *mandamus* in such a case; and if the Circuit Judge grant the writ in such a case, this court, on appeal from the order allowing the *mandamus*, will reverse.

APPEAL from order of Circuit Judge that *mandamus* issue to Register in Chancery.

The opinion states the case.

TERRY & LANE, for appellant.

E. L. CLARKSON, *contra*.

MANNING, J.—Appellee is a married woman, against whom a decree subjecting the proceeds of property of her separate estate to the payment of a mortgage debt, was rendered in 1877, in the Chancery Court of Jefferson county, in favor of the Mobile Life Insurance Company. She prayed an appeal to the Supreme Court, without giving security for

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the costs, having made and offered an affidavit of her inability to do so, and claiming the appeal by virtue of section 3930 of the Code of 1876.

The statute gives such right, affidavit being duly made, "when any judgment of the Circuit Court; or any decree of the Chancery Court, has been or may be rendered, *subjecting to sale the separate estate of a married woman, or any part thereof*," &c. It is insisted that Mrs. McDonald is not within this act, because the decree appealed from does not subject to sale any such estate, but only orders, instead, an appropriation of money in court to the payment of the debt. The fact is, that under a former decree in the same cause, the land had been sold to complainant, the Insurance Company, and the sale confirmed; after which, upon appeal, this court reversed that decree, and remanded the cause; and upon another hearing, after amendment of the bill, and, perhaps, upon additional evidence, a decree was again rendered against defendant, Mrs. McDonald, the sale previously made confirmed, and the proceeds of it ordered to be paid paid to the Insurance Company. This is the decree from which the appeal now sought to be made effectual, is taken.

It would be a very narrow view of the statute, a mere sticking in the bark, to construe it when the land itself has been thus sold, as not embracing the proceeds as standing in the place of the land. The object of the law would, in such a case, plainly not be carried out. We have no doubt that this change of Mrs. McDonald's property from land into money, did not impair her right to appeal under the section of the Code in question.

By holding that Mrs. McDonald is not entitled to the appeal without security for costs, because she has been made a "free dealer," and authorized to contract as a *femme sole*, we should be putting an exception into the statute which the legislature did not place there, and this we do not feel at liberty to do.

Upon an application for a *mandamus*, we cannot look beyond to consider what the result of the appeal in the cause would probably be, with a view to determine thereby whether the appeal should be allowed or not. A party against whom a decree is rendered, is entitled to that, according to the law, as a matter of right.

But the application in this case was made to a Circuit Court Judge, for a *mandamus* to the Register of a Chancery Court, to make out and send up a transcript of the record of a cause in the Chancery Court, into this court, to be here heard and reviewed upon appeal. And no reason is shown why resort for an order to that effect was not had either to

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the Supreme Court, to which the appeal is taken, or to the Chancellor, if any order was necessary. It does not come within the scope of a Circuit Judge's jurisdiction to control the Register of a Chancery Court, in the discharge of his duties in relation to causes therein. The Chancellor might make any order necessary to effect the object of this proceeding, or a writ of *certiorari* be obtained from this court, upon motion, requiring a copy of the record to be sent up.

For this reason, let the order for a *mandamus* be reversed, and the application be dismissed.

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Statutory Real Action.

1. *Limitations; statute of, what possession sufficient to support plea.*—An adverse possession, open, notorious, accompanied with acts of ownership, bars an action for the recovery of lands, without any reference to the *bona fides*, or color of title, under which the adverse holder claims ownership.

2. *Same; what will not stop running of.*—When the defendant or those whose title he has, had open, pronounced adverse possession, claiming ownership during the life-time of the true owner, his death would not arrest the running of the statute of limitations, although his heirs, the plaintiffs in this suit, were then infants.

3. *Deposition; when properly suppressed.*—Hearsay evidence contained in the deposition of a witness, is properly suppressed on motion of the opposite party.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN K. HENRY.

The appellees, Mary Roberts and others, brought this action against L. D. G. Smith and his wife, to recover the possession of certain premises in the city of Greenville, Alabama. The case was tried on the pleas of the general issue and the statute of limitations of ten years, and resulted in a judgment for the plaintiffs. The plaintiffs claimed title to the premises by virtue of a deed to their father, M. M. Roberts, made in 1860, by one Black and his wife, who were shown to have been in possession of the premises at the time of making the deed, and under which he went into possession.

The defendants relied on the following facts to support their plea of the statute of limitations: One Wood went into possession of the land sued for in 1861, and claimed to own it as his own, residing on it with his family and making improvements on it. Wood continued in possession until 1868,

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when he sold and conveyed the same to one Boyd, who held possession for two years, and then conveyed the same to the appellants, who had lived on the place ever since. It was shown that M. M. Roberts, the father of plaintiffs, died in 1866, and that the plaintiffs were then and still are minors. It is not shown how Wood obtained possession of the land.

On the trial, the defendants introduced the deposition of one M. L. Wood, which contained, among other things, the following: "I do not know anything about said Wood paying for said lot of my own knowledge, or from what I have heard Roberts say; and that my husband and said Wood went to Roberts' house with the money one night, but Mrs. Roberts refused to sign the deed after Roberts had. They brought the money back and gave it to me, and the next night they got the money from me, and went to Roberts' house." On motion of the plaintiffs, this portion of the deposition of said witness was suppressed. The deposition of this witness also contained the following, which the court, on motion, suppressed: "I never knew or heard of Roberts setting up any claim, right, or title to said lot after this. Wood went over to his house the night I speak of in the preceding interrogatory with the money." To this action of the court the defendants duly excepted.

Upon this evidence, the court charged the jury, "That an uninterrupted adverse possession of real property for ten years, created a bar to a recovery of it even by the rightful owner of it. But to constitute such an adverse possession as will defeat a recovery by the party who really owns the land, and holds it under a paramount written title, the possession set up as a bar must appear to have been actual, open, notorious, and continued for the whole period of ten years under a *bona fide* claim of title or under color of title, one or both, which claim of title is openly asserted as hostile or adverse to the title of the plaintiffs. That a mere possession, though it may have continued for ten years, and though it was open and notorious, and accompanied with acts of, and claim of ownership, unless such possession was accompanied with a *bona fide* claim of title, or with color of title, one or the other will not create the bar of the statute against those holding the real paramount paper title. And such possession, without a *bona fide* claim of title, or without color of title, one or the other could only be sufficient, if good at all, to defeat a recovery when the plaintiff relied upon a mere prior possession on his part for a recovery."

"The plaintiffs in this case rely upon a deed to their ancestor, M. M. Roberts, by one Black and wife, who, it is admitted, were in the actual possession of the lot sued for when

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they executed the deed to M. M. Roberts, the plaintiffs' ancestor, that plaintiffs' ancestor went into possession of the said lot under the deed so made, and that this was before the defendants, or those under whom they claim were ever in possession, or set up any claim to the lot; and these facts being admitted, before the defendants can defend upon adverse possession of ten years, the proof must satisfy the jury that the defendants and those under whom they claim, did for ten years before the bringing of this suit have the actual, open, notorious, and continued adverse possession of the lot sued for, holding it under a *bona fide* claim of title, or under a color of title, one or the other, and that the mere naked claim of the lot and acts of ownership in relation thereto would not be sufficient, unless there was a *bona fide* claim of title to it set up adversely to the plaintiffs or their ancestor." To this charge the defendants excepted.

The defendants then asked the following written charges: "1. If the jury believe from the evidence, that Wood was in possession of the land sued for, claiming the same openly, and building houses and other acts of ownership, this may create adverse possession without any written title. 2. That if Wood is shown to have been in adverse possession of the land sued for, short of the period which would create a bar under the statute of limitations, the continuance of it will be presumed in the absence of any proof of an abandonment or possession by another under claim of title. 3. If the jury believe from the evidence, that Wood was in adverse possession of the land sued for before the death of M. M. Roberts, and that such possession was continued by the defendants and those through which they claim possession, either under paper title or otherwise, for ten years before the commencement of this suit, then the plaintiffs cannot recover. 4. The possession under written title by the claimants in this case subsequent to Wood, will not stop or destroy the adverse claim of Wood in their favor, from whom and through whom they obtained possession and claim of right. 5. That adverse possession may be set up either under written claim of title or adverse possession without written title." The court refused to give each of these charges, and the defendants separately excepted.

The charge given, the refusal to charge as requested, and the suppression of parts of the deposition of the witness Wood, are now assigned as error.

J. M. POSEY, for appellants.

GAMBLE & BOLLING, *contra*.

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STONE, J.—There is testimony in this record tending to show that Wood went into possession of the lot in controversy in 1861, and remained in actual possession about eight years; that he, Wood, then conveyed to Boyd, who was in possession by her tenant for one or more years, and then conveyed to Smith, who entered into, and continued in possession until the present action was brought, in April, 1877; more than ten years after the statute of limitations commenced running after the war, September 21, 1865. There is no proof of title of any kind in Wood; but the testimony tends to show that he made valuable and permanent improvements on the lot, and he and those who claimed under him, all the while, asserted ownership of the lot, and claimed to hold it in their own independent right. This, if believed, constitutes adverse possession under the statute.—See authorities on appellant's brief; see, also, *Collins v. Johnson*, 57 Ala. 304; *Ladd v. Dubroca*, 61 Ala. 25. The Circuit Court erred in holding that an adverse possession of ten years is invalid against a paper title, "unless such possession was accompanied with a *bona fide* claim of title, or, with color of title." Adverse possession, open, notorious, accompanied with acts of ownership, or claim of ownership, bars an action for the recovery of lands, without any reference to the *bona fides*, or color of title, under which the adverse holder claims ownership.—*Bohannon v. Chapman*, 13 Ala. 641. *Herbert v. Hawrick*, rightly construed, is not inconsistent with this.—16 Ala. 581. It is the *actual* claim of ownership, not the *bona fides* which is the test.

The Circuit Court rightly suppressed portions of Mrs. Wood's testimony, on the motion of the appellee. All that was in it, calculated to affect this case, was but hearsay. The record contains no evidence of the manner in which Wood obtained possession. If Wood had independent, pronounced, adverse possession, claiming ownership during the life time of Roberts, the death of the latter did not arrest the running of the statute of limitations, although his heirs, plaintiffs in this suit, were then infants.—Code of 1876, §§ 3232, 3248; 2 Brick. Dig. 220, §§ 38, 44; *Daniel v. Day*, 51 Ala. 431.

Reversed and remanded.

[Borland et al. v. Box et al.]

Borland et al. v. Box et al.*Action on Promissory Note.*

Defendants rented lands from plaintiffs for a year, entered into possession and remained undisturbed, executing to the plaintiffs, individually, a note, stating that it was given for rent of certain described lands. *Held:*

Under plea denying plaintiffs ownership of the note, the defendants might show by parol that the plaintiffs had been school trustees of a fractional township in which the lands, which were the sixteenth section school lands, were situated, and that before the renting, but unknown to the parties, who contracted under the common mistake that the plaintiffs were still school trustees, the legislature had incorporated the lands into another township, the trustees of which claimed the debt; that these facts defeated the plaintiff's right of action, and that defendant and plaintiff both acknowledging the township as landlord, defendants in setting up the defense, were not denying or disputing the title of the landlord. (BRICKELL, C. J., dissenting.)

APPEAL from Geneva Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

This action was brought by the appellants, T. M. Borland and L. McLung, against the appellees, S. A. Box and J. A. Garrard, and is founded on a promissory note, of which the following is a copy:

“364.72. On the first day of October next we promise to pay L. McLung and T. M. Borland the sum of three hundred and sixty-four dollars and seventy-two cents, for the rent of land in section 16, township 7, range 12, Florida survey, and the produce raised on said land to be bound for the rent.

J. A. GARRARD,
U. A. Box,
S. A. Box.

January 3, 1876.

The defendants filed sworn pleas denying that the ownership of the note was in the plaintiffs, and averring that the note was given for the rent of lands belonging to the public schools. On the trial of the case, the plaintiffs introduced L. McLung as a witness, who testified that the plaintiffs had rented certain lands, for the year 1876, to the defendants, who had accepted said lease and gone into possession of said lands under the contract of renting, and had remained in peaceable possession of the said lands for the entire period for which plaintiffs rented said lands to them, and that the note sued on was given to the plaintiffs by the de-

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fendants for the rent of said lands for the year 1876, and that the plaintiffs had been in possession of said note ever since its execution, and had never transferred the same or any interest therein.

The defendants, on cross-examination, then asked the witness "if the lands rented by plaintiffs to defendant belonged to township 7, as school land, at the time they rented the same to defendants, and if said lands belonged to said township now?"

The plaintiffs objected to this question. 1st. Because defendants were estopped from denying plaintiffs' title to said land. 2d. Because said question was illegal. 3d. Because the question is immaterial in this, that defendants can not dispute plaintiffs' title to said lands.

The court overruled these objections, and required the witness to answer said question, and plaintiffs excepted. The witness then stated in answer to said question, that said lands rented by the plaintiffs to defendants for the year 1876, belonged to the school lands in section 16, township 7, range 12, at the time of the renting and up to the present time. The plaintiffs then moved to exclude this answer of the witness. 1st. Because the defendants could not dispute plaintiffs' title to said lands. 2d. Because defendants, having accepted a lease from plaintiffs to said lands, and enjoyed peaceable possession of said land for the stipulated period, were estopped from denying plaintiffs' title to said lands. The court overruled the plaintiffs' motion and they excepted. The defendants then asked said witness, "if at the time plaintiffs rented defendants said lands, the plaintiffs were acting as school trustees of township 7, range 12, of this State. This question was objected to on the grounds, 1st. Because it is illegal. 2d. Because it is irrelevant. 3. Because the defendants having accepted the lease from plaintiffs of said land in their individual capacity, they were estopped from showing that said lands belonged to township 7, range 12; in this State.

The court overruled these objections and required the witness to answer the question, and plaintiffs excepted.

The witness then testified that, at the time plaintiffs rented the defendants said lands, the plaintiffs were acting as school trustees for township 7, range 12. Defendants then asked said witness, "if they took said note from defendants for the rent of the school lands in section 16, township 7, range 12, as trustees of said township 7, range 12, in this State."

Plaintiffs objected to said question, 1st. Because the defendants had contracted with the plaintiffs in their individual capacity and not as trustees, and they were estopped from

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denying the title belonged to plaintiffs. 2d. Because the note showed on its face that said lands were rented from plaintiffs as their individual property and not as trustees of township 7, range 12. 3. Because the defendants can not show by oral testimony that said note was taken by the plaintiffs as trustees of township 7, range 12, because it would vary the written contract offered in evidence by the plaintiffs. The court overruled these objections and required the witness to answer these questions, and plaintiffs excepted.

The witness then testified that the plaintiffs took said note from the defendants for the rent of the school lands in section 16, township 7, range 12, as trustees of said township, and that the plaintiffs had held possession of said note from the time of its execution. This witness further testified that he (witness) was one of the plaintiffs and claimed an interest in said notes for building a public school house in township 7, range 12, and that it was agreed between witness and the superintendent of education for Geneva county, that witness was to be paid out of the rent of said lands for building said school house; that his co-plaintiff, Borland, claimed some interest in the note for services rendered said township, but that witness did not know whether the claim of Borland was a valid one or not. This witness further testified, that neither he nor said Borland were trustees of township 1, range 26, of Geneva county, and was not at the time of the renting of the land for which said note was given, nor at the beginning of this suit; and further, that S. A. Box, Michael Cooley and Daniel Cooper are and were such trustees at the time of said renting, and at the beginning of this suit. The plaintiffs objected to this evidence, on the same grounds heretofore stated. The court overruled the objections, and plaintiffs excepted.

The defendants then offered in evidence an act of the General Assembly of Alabama, approved January 27, 1875, by which it was enacted that fractional township 7, range 12, according to the Florida survey, lying in the county of Geneva, be and the same is hereby annexed and made part of township 1, range 26, according to the Alabama survey, in the county of Geneva, and that in all matters pertaining to schools in said county, after the passage of this act, said townships shall be held to constitute but one township. The plaintiffs objected to the introduction of this act, on the grounds stated above. The court overruled these objections, admitted the act, and the plaintiffs excepted.

This was all the evidence, and the plaintiff asked the court, in writing, to instruct the jury as follows: 1st. "That if the jury believe from the evidence that the plaintiffs rented

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said lands to the defendants for the year 1876, and that the defendants held the possession of the rented premises and remained in possession during said year 1876, without being disturbed or hindered in their possession during said year, and that the note sued on was given to the plaintiffs for the rent of said lands during said year, and that the plaintiffs have not parted with any interest they had in said note since its execution, then the plaintiffs are entitled to recover in the action." The court refused to give this charge, and the plaintiffs excepted. 2d. "That if the jury believe from the evidence that the plaintiffs rented to the defendants the lands during the year 1876, and the defendants went into possession of said lands under said contract of renting, and remained in the possession of said lands during the time stipulated between the parties, without being disturbed or hindered in their possession of said lands during said time, and that said note was given for the rent of said lands to plaintiffs, and plaintiffs have parted with no interest they had in said note at the time of its execution, and that their interest remains the same now that it was when said note was executed, that the defendants are estopped from denying that the plaintiffs are the beneficiaries of said note." The court refused to give said charge, and the plaintiffs excepted.

In consequence of the rulings of the court, the plaintiffs took a non-suit, with bill of exceptions, &c. The various rulings to which exceptions were reserved are now assigned as error.

W. D. ROBERTS, for appellants.—It was not competent for the defendants, after being in quiet possession for the full term of their lease, to avoid their own contract by showing a defective title in the plaintiffs. The defendants were estopped from denying the plaintiffs' title.—*Hardin Perkins v. The Governor*, Minor, 351.

The defendants having occupied the lands under their contract of renting for the full period stipulated for, without disturbance, can not dispute the plaintiffs' title without showing eviction or disturbance.—*Hanks v. Harrison & Patterson*, 4 Port. 509; *Terry v. Ferguson*, Adm'r., 8 Port. 500; *Pope v. Harkins et al.*, 16 Ala. 321; *Griffith v. Parmley*, 38 Ala. 393.

CARMICHAEL & MAULDIN, A. V. LEE, G. T. YELVERTON and B. F. CASSADY, *contra*.—While the general rule is, that a tenant can not deny the title of his landlord, this principle has no application to the case at bar. The relation of landlord and tenant did not exist between the parties. The

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appellants did not claim to own the land rented, and in the renting of it they acted as the trustees of township 7, range 12. By act of the legislature, passed before the making of the note sued on, that township, as a school district, had ceased to exist, and was merged into township 1, range 26. The power of the appellants, as school trustees, had ceased when the consolidation took place, and in renting the land and taking the note they acted without authority of law, and the contract can not be enforced in the courts.—*Milton v. Hayden*, 32 Ala. 30. The contract upon which the suit is founded is offensive to the act of the General Assembly consolidating fractional township 7, range 12, and township 1, range 26, and therefore their suit can not be maintained.—*McGehee v. Lindsay*, 6 Ala. 16. The pleading put in issue the ownership of the note, as well as the beneficial interest of appellants. The land at the time of the renting and the making of the note sued on, was the property of township 1, range 26, and the rent belonged to it. That township was a corporation capable of suing and being sued, and the rent of the lands was its property. The law expressly declares that such notes must be made payable to the township, and the taking of the note in their own name was a fraud on the township. The township were the owners, the plaintiffs only its self-constituted agents, and there is no principle of law which prohibits the tenant from setting up the facts.—See *English v. Key*, 39 Ala. 113.

MANNING, J.—This suit was brought upon a note given to plaintiffs for the rent of land. The objections to evidence admitted and charges refused, in the court below, and the only errors assigned, are founded on the rule that a tenant shall not be permitted to dispute the title of his landlord, especially when he has had undisturbed enjoyment and use of the premises leased, during the term for which they were let to him. This is a well established and very important and salutary general rule. The reason on which it rests is, that legal policy in support of the interests of society, requires that the situation of a landlord and the rights he claims in respect of property which he is in possession of and lets to another as his tenant, shall not be impaired by the act of a person who, by recognizing them, obtained a position of advantage in relation to the property. He is held to have tacitly engaged not to avail himself of that position, to do anything in derogation of the rights so recognized. Is the rule violated by anything done in the case now in hand?

The lands leased, in this instance, and for the rent of which

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during the year 1876, the note sued on was given, were sixteenth section school lands, in what was township 7, range 12, according to the Florida survey made under the authority of the United States; a part of which township was found to be across the line between Florida and Alabama, and therefore a fractional township in this State; and this part having been organized as a township in Alabama, appellants were, in 1874, elected school trustees thereof. In 1875 this fraction was, by an act of the legislature, abolished as a separate corporation, and annexed to and made a part of an adjoining township. Doubtless, without being aware of this, appellants as trustees of said township, acting in their public capacity as such, in January, 1876, leased the land to appellees, defendants below, for that year, not giving to them (it seems) any written lease, and taking from them their note for the rent, payable to themselves.

It was as such school lands and by appellants as township trustees, that the lease was confessedly made. This was understood, and on all hands admitted. The township was in fact the acknowledged landlord, and the rent to be paid was to go to the township for the support of its public schools. The mistake of taking the note payable to plaintiffs, instead of, as the law required, to the township, did not change the nature of the transaction, or the rights of the parties to it, as then understood by everybody. And in eliciting evidence of these facts by a cross-examination of the plaintiffs themselves, defendants were not trying to prove or do anything in derogation of the rights of their landlord, or of any rights asserted by the plaintiffs or recognized by the defendants when the lease was made.

The issue joined, and to which no objection is offered, is made up under section 2890 (2523) of the Code of 1876, which requires the suit on such a note to be brought in the name of the party really interested, whether he have the legal title or not; and the evidence objected to tended to establish that this suit was not so brought. No other question was raised by the pleadings. But the evidence shows that plaintiffs were seeking to recover the amount of the note to apply it to the payment of money which they claimed that the fractional township owed them—while one of the defendants, who denied their right to recover, is a trustee of the township as constituted by the act of 1875, and insists that the money is due to it. That the fractional township 7 is united to and a part of township 26, range 1, of the Alabama survey, is not disputed; and the rents of this school land, therefore, belong to the township. In showing this, defendants are not turning against their landlord or controverting

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any thing which, as tenants, they were bound to concede. There is no inconsistency between their present position and that they assumed when they became tenants of the township. The rent money sued for is due to the township with which the fractional one is identified; and it is only through it that the latter can obtain the benefit of that rent. And since the plaintiffs are not the administrators of these school funds, and the law has provided that the trustees entitled to receive the money shall, before doing so, give bond as public officers for the faithful application of it, the circuit judge did not err in admitting the evidence objected to or in refusing the charges requested.

Let the judgment of the Circuit Court be affirmed.

BRICKELL, C. J., dissenting.

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Application for Mandamus.

1. *Common law certiorari; what proper judgment on.*—Where proceedings of the Commissioners' Court have been removed on common law writ of *certiorari*, to the Circuit Court, that court can only enquire whether enough affirmatively appears from the record sent up, to maintain the jurisdiction and decree of the lower court, and must affirm or quash the proceedings accordingly—the trial is not *de novo*.

2. *Rehearing under Code; to what does not apply.*—In such a case, what the record shows or does not show, cannot be aided by extrinsic proof in the higher court; nor do the provisions of the Code, as to rehearings at law, (chap. 16, title 1, part 3, of Code,) apply to such trials on common law *certiorari*; and the Circuit Court, after the term in which its judgment is rendered in such case, is without authority or jurisdiction to alter it, or grant a rehearing.

Application for *mandamus* to the Circuit Court of Madison, commanding that court to vacate and annul a certain order.

The opinion states the case.

HUMES & GORDON, for motion.—The *certiorari* in this cause was a common law *certiorari*, and the only judgment which the Circuit Court could render was one affirming or quashing the proceedings of the Commissioners' Court. The action of the Circuit Court, in this instance, was strictly appellate and revisory.—2 Brick. Dig. 401, § 19; 20 Ala. 54. The court was without jurisdiction to hear or determine the ap-

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plication for a new trial, and its judgments are *coram non judice*. The appearance and consent of the petitioner could not confer jurisdiction on the court.—13 Ala. 533. The case of *McLendon v. Darden*, 53 Ala. 67, is conclusive of this case.

STONE, J.—The present case originated in an application to the Court of County Commissioners of Madison county, for the establishment of a public road. The application was resisted by the Madison Turnpike Company, a corporation, on the alleged ground that the authorization of the proposed road would be an invasion of the corporate rights of the Turnpike Company. The Court of County Commissioners granted the petition, and made an order, authorizing the opening and establishment of the road. The Turnpike Company thereupon petitioned the Circuit Court of Madison county, and obtained a *certiorari*, removing the record of the cause into that court. *Certiorari* thus awarded is what is known as a common law *certiorari*, as contradistinguished from statutory *certiorari*. This writ usually lies to remove from the lower or inferior courts, proceedings which are created or regulated by statute merely, for the purpose of revision. The trial of such causes in the higher court, to which the proceedings are thus removed, is not *de novo*, but upon the record certified from the inferior court. The judgment is either that the proceedings of the lower court be quashed, or that they be affirmed.—See Bouv. Dic., title *certiorari*, and the many authorities cited; 2 Brick. Dig. 400–1, §§ 14, 15, 17, 19, 20, 25, 27.

When the record in this cause was certified to the Circuit Court, that court could only inquire whether enough was affirmatively shown on the record to maintain the jurisdiction and decree of the court.—*Commissioners Court of Lawrence v. Bowie*, 34 Ala. 461. What the record showed, or did not show, could not be aided by any extrinsic proof, oral or otherwise. The Circuit Court could only affirm or quash the proceedings. Hence, surprise, accident, mistake or fraud can not arise, or be the predicate of relief in such a trial as this. Chapter 16, title 1, part 3, of the Code of 1876, commencing with section 3161, is not adapted in letter, spirit or machinery to rehearings of judgments pronounced on common law *certiorari*. The rehearing in this cause should not have been granted. Nor can the motion by petitioner, made in the Circuit Court, for leave to amend the petition for *certiorari*, be regarded as curing the irregularity. The Circuit Court has no jurisdiction of petitions for the establishment of public roads; and consent can not give jurisdiction of subject matter. When the Circuit Court pronounced judg-

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ment on the *certiorari*, whether right or wrong, and the term of the court at which the judgment was rendered was adjourned, the case was beyond its jurisdiction for all time, and any order afterwards made by it, was *coram non judice*.

A rule is ordered to the Circuit Court of Madison county, to show cause why a *mandamus* shall not issue, commanding that court to vacate and annul the order granting a rehearing in said cause, and to dismiss said cause from the docket, unless, in the meantime, said cause be dismissed from the docket of the Circuit Court, pursuant to the principles above declared.

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Bill in Equity to vacate Proceedings in Probate Court, &c.

1. *Pecuniary legatee; when equity will interfere with executor, to secure legacy.* Formerly, it seems, equity would not interfere at the instance of a pecuniary legatee, whose legacy was payable in the future, to compel the executor to give security for its payment, or to pay it into court, unless the legacy was absolute; but the modern doctrine is that the court will intervene, though the legacy is contingent, if sufficient reason be shown for such interference; whether in the one case or the other, the legatee's right to relief depends on the existence of assets liable for the satisfaction of the legacy, which it is the executor's duty to hold for its payment, when it is due.

2. *Removal of administrator, power of Chancery Court to decree; when should not be done.*—Whether, in any case, the Court of Chancery can remove an administrator, deriving authority from a grant of letters by the Probate Court, is not decided; but if it has such power, only an extreme case will justify its exercise, and the removal can not be made, unless fraud or some distinct ground of removal in the Probate Court is clearly shown.

3. *Same; what does not justify.*—The fact that the interest of distributees conflict, and that the principal or residuary legatee stands in the attitude of adversary to pecuniary or demonstrative legatees, or to specific devisees, does not deprive the next of kin, or the residuary legatee, of priority of right to administration; and such antagonisms of themselves, in the absence of misconduct, can not justify the removal of the administrator.

4. *Receivers; when power of appointing should not be exercised by Chancery Court.*—In general, creditors, legatees, or next of kin, can obtain ample protection against loss, and security for faithful administration, by a resort to the Probate Court; and hence, though a court of equity has jurisdiction to appoint a receiver of assets, practically taking the administration into its own hands, it will not exercise this jurisdiction, unless there is manifest danger of loss, which may be irreparable.

5. *Decree of insolvency; who can not assail.*—A decree of insolvency merely ascertains, as between the personal representatives and the creditors, the status of the estate; as to next of kin, or legatees, it is *res inter alios acta*, not affecting their rights, and not evidence against them of any fact ascertained by it; and its validity is not affected, because legatees were not parties to the proceedings; and hence they can not assail it for fraud.

6. *Insolvent estate; decree of Probate Court on claims filed against; effect of;*

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who may assail.—The ascertainment of the validity and amount of the demand of a creditor, in the course of proceedings in insolvency in the Court of Probate, has the force and effect of a judgment *in personam* against the personal representative, obtained in the regular course of proceedings in a suit at common law, by a creditor; and as against legatees, who claim in privity with the personal representative, is *prima facie* evidence of the debt; and the legatee may assail such judgment for fraud, or when the administrator claims credit for it, show that defenses existed, and by proper diligence he could have prevented it from being obtained.

7. *Sale of devised lands; who can not complain of.*—Although a sale of lands devised by the executor, may be void, as to the devisee, and the lands chargeable with a pecuniary legacy to complainant, such legatee can not complain of it, or have it set aside, when the devisee acquiesces, it not being shown that the lands sold for a sum disproportionate to their value, or would sell for more on a resale, or there had been a misapplication of the proceeds to the injury of the legatee.

APPEAL from Bullock Chancery Court.

Heard before Hon. B. B. McCRAW.

This was a bill filed by the appellee, Kate Carter, by next friend, against the appellants, E. Troupe Randle, Mary A. Randle, and others, who are respectively the administrator, heirs-at-law, and the creditors of James F. Carter, deceased.

The bill alleges that James F. Carter died testate, in Macon county, Ala., in January, 1866, leaving a last will and testament, which was duly admitted to probate, and possessed of a large estate, both real and personal. This will contains the following item: "I further will that my boy Beauregard, and his sister Kate, to be educated North, and their expenses paid out of my estate, and the sum of five thousand dollars to be given each one of them after they are twenty-one years of age." At the time of the death of said Carter, he had only one child—Mary A. Carter—who subsequently married E. Troupe Randle, and was his sole heir-at-law. The executor, appointed by the will of said Carter, had died, and E. T. Randle had been appointed administrator *de bonis non*.

The bill further alleged that Beauregard had died intestate, leaving the complainant his sole heir at law.

The bill then charges that, at the time of his death, Carter was seized and possessed of a very large estate, both real and personal, and that the value of the property owned by him at his death, was greater by eighty thousand dollars than the liabilities then outstanding against him or his estate, and that the property owned by him in the State of Alabama was greater by forty thousand dollars than the debts of the deceased; that, besides the property owned by him in Alabama, he was possessed of property outside of the State of the value of thirty thousand dollars; that his estate had never been insolvent, and that the decree of insolvency of

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said estate, which had been declared and decreed by the Probate Court of Macon county, were the "direct offspring of the wasting and maladministration of the estate, by the administrator *de bonis non* thereof, the said E. Troupe Randle, and was the immediate result of his failure to disclose to said Probate Court, and to bring within the powers of said Probate Court a large amount of property really belonging to said estate, which he knew, or had notice of, and which, by any just and faithful exercise of his duties and powers as administrator, he could have brought within the power and control of said Probate Court, and have made available to the creditors and legatees of said estate; that the said declaration, as well as each and every decree or order made by the Probate Court since the appointment of Randle, had been obtained and procured by fraud and imposition on his part in the Probate Court, and by his withholding from that court the real condition of said estate, and by over-estimating the liabilities of the estate and undervaluing its assets. The bill further charges that shortly after the appointment of the said Randle as administrator *de bonis non*, his wife, the said Mary A., filed her bill in the Chancery Court of Macon county, Alabama, against the said Randle, alleging that the said Carter had, in his life-time, received, as her trustee, under the will of her grand-father, N. B. Powell, a large amount of property belonging to her, for which he had never accounted, and that such proceedings were had in said Chancery Court that a decree was rendered in her favor for a large sum. The bill then charges that this claim was unfounded and untrue; that no will of said N. B. Powell had ever been admitted to probate until long after the death of said Carter, and that Carter never was trustee for said Mary A. under any will or otherwise; that neither the complainant or her brother, Beauregard, were parties to this suit, or had any notice thereof, and that the same was null and void as to them, and that these proceedings were part and parcel of a fraudulent intent on the part of said Mary A. and her husband, the said E. Troupe Randle, to defraud complainant out of her just rights under the will of said Carter; that at the time said Mary instituted her suit, more than eighteen months had elapsed since the grant of letters under the will of said Carter, and that the said E. Troupe Randle fraudulently neglected to defend said suit on such ground, and permitted said decree to be rendered against him in her favor.

It was shown that N. B. Powell, the grand-father of the said Mary A., died testate in Macon county, Alabama, in 1862, leaving a will by which he bequeathed certain property

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to said Carter in trust, and that under and by virtue of said will, Carter received the property, giving the executors of said N. B. Powell a receipt for the same, and that he had never accounted for the said property so received up to the time of his death. And E. Troupe Randle, in his sworn answer, testifies on information and belief, that shortly after the death of said N. B. Powell, who at that time resided in a part of Macon county which has since been transferred to Bullock, the will of said Powell was duly admitted to probate in the county of Macon, and that the executors therein named qualified and took possession of the property of said Powell, and proceeded to execute his said will, and that while the executors were thus acting, and after the proceeding in the Probate Court of Macon county, Carter received from them the property bequeathed to him in trust for the said Mary A. After the death of said James A. Carter, it was ascertained that no order, entry or decree had been made upon the minutes of the Court of Probate of Macon county, and upon legal advice the will of said Powell was propounded and admitted to probate in Bullock county.

The bill then charges that the administrator had fraudulently combined with the creditors of the estate, after the same had been declared insolvent, and had allowed claims to be established against the estate which were barred by the statute of non-claim, paying the same for a sum greatly less than the amount allowed, and claiming credits largely in excess of the amount paid. The bill also charges that the administrator had sold lands belonging to the estate of said Carter under void orders of the Probate Court of Macon county, and had received the purchase-money, and put the purchasers in possession, in furtherance of his fraudulent intent to deprive complainant of her just rights under the will of said Carter.

The prayer of the bill is that the said E. Troupe Randle be required to disclose, under oath, what property belonging to the estate of said Carter had come into his possession, and what disposition he had made of the same; that he be required to disclose what property, if any, had come to his knowledge or control which belonged to the estate of said Carter, situated outside of the State of Alabama. That certain creditors of said Carter, who are made parties defendant, be required to propound their claims, and that a decree be rendered ascertaining what is justly due them; that the sales of the lands belonging to said estate be set aside and declared null and void; that the report and decree of insolvency of the estate of said Carter, and each settlement and decree by said Probate Court binding on said estate since E.

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T. Randle became the administrator, be declared null and void and vacated; that the administration of the estate of said Carter be removed from the Probate Court of Macon county to the Chancery Court of Bullock county, and that a settlement of said estate be there had; that said E. T. Randle be removed from the administration of the estate of said Carter, and that a receiver be appointed to take charge of the assets of said estate, and for general relief.

The defendants, E. T. and Mary A. Randle, were required to answer under oath, and they filed sworn answers denying every allegation of fraud, collusion, or maladministration, averring that the estate had been faithfully and honestly administered in every respect.

The said Mary A. filed a cross-bill, which the Chancellor dismissed, but in the view which the court take of this case, further mention of it is unnecessary. It was admitted, by counsel, that the said Mary A. was the sole heir-at-law of said Carter. The only testimony for the complainant was a transcript from the Probate Court of Macon county showing the various orders and decrees made in the conduct of the administration, and the depositions of certain witnesses to establish her identity as the person named in the will of said Carter. No evidence was offered by her to show fraud in the administrator. It was shown for the administrator that the lands sold by him under the order of the Probate Court, brought their full value.

The Chancellor rendered a decree declaring the complainant entitled to relief; adjudging that the decree of the Probate Court declaring the estate of Carter insolvent be set aside and annulled; that every order, decree or settlement made in or by the Probate Court of Macon county after Randle became administrator, be likewise declared null and void; that the administration be removed from the Probate Court of Macon county into the Chancery Court of Bullock county; that Randle be removed from the administration of the estate, and required to make settlement in the Chancery Court; and that he be enjoined from any further action as such administrator; that the Register in Chancery of Bullock county be appointed receiver of the property of every kind and description belonging to the estate of said Carter; that the decree of the Chancery Court of Macon county, in favor of Mary A. Randle, be declared null and void and fraudulent as to complainant; that the sales of land made by Randle, as administrator, be set aside and vacated, and declared null and void. A reference was ordered to ascertain what was due the estate from said Randle, and the costs

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were taxed against him. From this decree Randle appeals.

STONE & CLOPTON, for appellants.—I. The complainant claims by virtue of a legacy under the will of Jane T. Carter, and this is her sole right to file this bill. It is a pecuniary legacy. The rule is that the real estate is never to be charged with the payment of legacies, unless it is plain from the will that the testator intended to charge it. If a testator gives a legacy, without specifying who shall pay it, or out of what fund it shall be paid, the legal presumption is that he intended it should be paid out of his personal estate only; and, if that is not sufficient, the legacy fails.—7 Paige, 421; 2 John. Ch. 614; 2 Jarman on Wills, 362; 8 Peck, 478; 9 Peck, 561. There is no expression in the will which shows any intention to make complainant's legacy a charge on the real estate of the testator. It follows that the complainant has no right or interest in the land, and cannot be heard to complain that the sale was void. Whether void or not, it does not affect her rights or interest.

II. The estate was declared insolvent by the Probate Court, and that court had jurisdiction. Proceedings in the Probate Court to declare an estate insolvent, are *in rem*, and the jurisdiction attaches in the report of the administrator, and the decree is not void for irregularities.—45 Ala. 496. These proceedings give the Probate Court exclusive jurisdiction of the estate.—43 Ala. 434. The Chancery Court could not vacate the decree of insolvency except for fraud, and no fraud is shown; it had no power to oust the jurisdiction of the Probate Court and remove the administration into chancery.

III. The decree of the Chancery Court of Macon, in favor of Mary A. Randle, was clearly regular and valid. The complainant had no right involved in it and no cause of complaint at its rendition. She was not a proper party to such a bill. Neither Carter nor his administrator could deny the title of said Mary A. to the property received by Carter. It is immaterial whether he received it under the will of Powell or not. If he received it at all his estate was liable for its restitution, and no harm could follow to complainant by its enforcement.

IV. The proceedings of the Probate Court were certainly valid and binding until assailed for fraud, and fraud is not shown by one particle of proof in this case. The complainant was a party to these proceedings, was represented by a guardian *ad litem*, and they are binding on her till she clearly shows that they were obtained by fraud.

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GOLDTHWAITE, RICE & SEMPLE, and ARRINGTON & McCALL,
contra.

No brief for appellee came into the Reporter's hand.

BRICKELL, C. J.—It is not important to determine whether the bequest to the appellee and her deceased brother, is vested or contingent. The period for the payment had not arrived, and whether the legacy is vested or contingent, the only relief she could claim, was payment into court, or security for payment, if the debts of the testator were paid, or in the course of proper administration, ought to have been paid, and the administrator had assets which were liable to satisfy the legacies. Formerly, it seems, a court of equity would not intervene, at the instance of a pecuniary legatee, whose legacy was payable in the future, to compel the executor to give security for its payment, or to pay it into court, unless the legacy was absolute. The modern doctrine is, that the court will intervene though the legacy is contingent, and may require security, or order its payment into court. And, though generally, the court will not withdraw assets from the custody of an executor or administrator, unless he has been guilty of misconduct, or there is just cause to apprehend loss; in the exercise of its jurisdiction for the protection of future rights and interests, it will intervene though there has been no misconduct, no *devastavit* or reason to apprehend it.—1 Story's Eq. § 603. The intervention necessarily depends on the existence of assets, which it is the duty of the executor to hold for the satisfaction of the legacy, when it becomes payable, and which would be liable to its satisfaction, if the period of payment had arrived. The court may, if the necessities of the case require it, as it would when necessary for the recovery of a legacy payable presently, marshal the assets, and draw to itself the entire administration of the estate. So it may, if the facts require it, withdraw the assets from the custody of the executor or administrator, and commit them to a receiver.

It is not necessary to inquire whether, in any case, the Court of Chancery can remove an administrator deriving his authority from the grant of another court of exclusive jurisdiction. If the court has the power, it is only an extreme case, which will justify its exercise. The statutes have committed the power to remove executors or administrators to the Court of Probate granting the letters, and have carefully defined the causes of removal. The Court of Chancery can protect its suitors against the delinquency of executors or administrators, in nearly every possible case, without resort.

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ing to the extreme measure of removal, which can be justified only when actual fraud, or some of the distinct grounds of removal in the Court of Probate are shown to exist. Fraud can never be imputed lightly, and though in the course of an administration, there may arise an antagonism of interest between the administrator or executor, and the distributees, or legatees, or creditors, it furnishes no ground of removal. Priority of right in the grant of administration, the law confers on the next of kin, or on the residuary or principal legatee. It will often occur that the interest of distributees will conflict, and that the principal, or residuary legatee, will stand in the attitude of adversary to pecuniary, or specific, or demonstrative legatees, or to specific devisees. Such conflicts cannot deprive the next of kin, or the principal, or residuary legatee, of the priority of right to the administration.—*Bingham v. Crenshaw*, 34 Ala. 683. As they do not in the first instance deprive of priority, when they arise subsequently they cannot of themselves, in the absence of misconduct, justify removal. The bill abounds with allegations of fraud and collusion imputed to the administrator. The evidence, however, does not keep pace with the freedom and liberality of allegation. Indeed, there has been no attempt to support them by evidence; and they stand positively denied by the answers. It is, therefore, difficult to understand on what ground the Chancellor proceeded to decree the removal of the appellant from the administration, unless it was because he was the husband of the principal legatee, and it was supposed his interest was adverse to that of the appellee. Admitting the conflict, it did not warrant the decree of removal.

A court of equity, in all cases, exercises with caution the jurisdiction to appoint receivers. There must be a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss.—*High on Receivers*, §§ 55-9. A strong case is required to induce the appointment of a receiver to take assets from the custody of an executor or administrator, displacing his authority. The executor is appointed by the testator, who has the right to declare in whom the management of his estate after his death shall be reposed. The administrator derives his authority from, and is in a qualified sense, the officer of another court of exclusive jurisdiction, compelled to give and keep a bond with sufficient sureties for the prompt and faithful discharge of the trusts of the administration. The court is, therefore, reluctant to interfere with them by the appointment of a receiver. There must be actual misconduct, or fraud, and immediate danger of loss, or the appointment of a receiver can not be

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justified. A different rule obtains, and should obtain, than in the case of trustees. The Court of Probate has, by the Constitution, a general jurisdiction over the grant of letters testamentary, and of administration, in which is involved the power of revocation. The grant may be revoked whenever gross misconduct is shown, or whenever a necessity exists, additional security may be required. Protection against loss to creditors, legatees, or next of kin, and security for a faithful administration, are within the power of the parties and the competency of that court. There can but seldom be a necessity for the exercise of any other preventive or protective remedy, than such as that court can afford, and hence, though a court of equity has the jurisdiction to appoint a receiver of the assets, practically taking the administration into its hands, the jurisdiction is not exercised, unless there is manifest danger of loss which may be irreparable.—*Ex parte Walker*, 25 Ala. 81. In the present case, without any evidence of misconduct on the part of the administrator, and without allegation or proof of his insolvency, or of the insufficiency of his official bond, the Chancellor appointed a receiver of the assets, from whom no bond or security was required. Creditors, legatees and devisees are deprived of the security afforded by the bond of the administrator, and the assets committed to the custody of the register of the court, as receiver, without security. We add, only the decree is in this respect erroneous.

The decree of the insolvency of the estate the Court of Probate had jurisdiction to render. Whether it was regular and unassailable on error by any party to it, we have not, and could not, examine in this controversy, though not even irregularity has been imputed to it by the appellee. The bill charges it was obtained by the fraud of the administrator, and the collusion of the creditors. The charge is denied, and no evidence was given to sustain it, yet the Chancellor pronounced against it a sentence of nullity. It is possible the conclusion was reached, on the supposition that it was essential to the validity of the decree, that the appellee and other legatees, or the devisee, were necessary parties to the proceedings. A decree of insolvency in the Court of Probate merely ascertains as between the personal representative and the creditors, the *status* of the estate, and its operation is, to transfer to the Court of Probate exclusive jurisdiction of all claims against the estate—claims of creditors, of course, not the claims of legatees or next of kin, for the whole proceeding is founded on the fact that the assets are insufficient for the payment of debts to which they are primarily liable. There are no other parties, or were not under

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the statutes existing when this decree was rendered, than the personal representative and the creditors. As to the next of kin, or legatees, the record is *res inter alios acta*, not affecting their rights, and not evidence against them of any fact ascertained by it.—*McGuire v. Shelby*, 20 Ala. 456; *State Bank v. Ellis*, 30 Ala. 478; *Lambeth v. Garber*, 6 Ala. 870; *Edwards v. Gibbs*, 11 Ala. 292. The regularity of the decree of insolvency is not affected, because the appellee was not a party. There was no process by which she could be made a party, and it would at least have been irregular if any had been resorted to for that purpose.

Nor is the appellee entitled to impeach the decree if it was tainted with fraud, for the simple reason that it is not in its operation, of the slightest injury to her. Strangers may collaterally impeach judgments or decrees for fraud or collusion between the parties to them, but they must have a right the judgment injuriously affects, if it has full effect. When allowing the judgment full operation, their rights are unaffected; they can no more be heard collaterally to assail it for fraud, than they could be permitted directly to question it for error or irregularity.—*Freeman on Judgments*, §§ 334–337. The decree of insolvency not being evidence against the appellee, operating only as between the creditors and the personal representative, the Chancellor was in error in pronouncing it void at her instance.

Subsequent proceedings ascertaining the validity and amount of the claims of creditors stand upon a different ground. The ascertainment of the validity and amount of the demand of a creditor in the course of proceedings in insolvency in the Court of Probate has all the attributes of a judgment *in personam* against the personal representative, obtained in the regular course of a suit at common law by the creditor. In *Heydenfeldt v. Towns*, 27 Ala. 429, it is said, that the decree in favor of the creditor in the course of the insolvency proceeding, has, as matter of evidence, a larger operation than a judgment at common law against the personal representative; that it is as against the heir or devisee, *prima facie* evidence of the debt or demand. However that may be, it is as against legatees who claim privity with the personal representative, as are all judgments rendered by a court of competent jurisdiction, *prima facie* evidence of the debt or demand. The legatee may assail all such judgments for fraud, and, if successful, deprive them of all force. Or, if the personal representative claims reimbursement from the assets for their satisfaction, may show that valid defenses existed, which, if he had been diligent in ascertaining and had preferred, they could not have been obtained. The appellee

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has assailed the claims of the creditors for fraud, and has also averred that as to some of them valid defenses existed which ought to have been made. But of these averments, denied by the answers, no evidence whatever was offered. The judgments of the Court of Probate, ascertaining the demands of the creditors, remain *prima facie* evidence against the appellee, and the Chancellor was in error in pronouncing them void.

The decree of the Court of Chancery of Macon county in favor of Mrs. Randle, against the administrator, was also, by the Chancellor, declared void as to the appellee. The decree of the Chancellor is not accompanied by any statement of the reasons which led to his conclusions, and we have not been furnished with any argument in support of many of them. We can hardly suppose this decree was pronounced void, because the appellee was not a party to the suit in which it was rendered. That is one of the grounds on which the bill impeaches it, but it seems scarcely necessary to say the appellee could not properly have been made a party to the suit, which had for its purposes simply an account of the testator's trusteeship of personal property of the complainant, and a decree against the administrator, for the balance found due on such accounting. The only proper parties were the *cestui que trust*, and the administrator. Nor was it at all material whether the will of the grandfather had been admitted to probate before the testator received the trust property, or whether it was subsequently irregularly admitted to probate. The undisputed fact remains, that during the minority of the *cestui que trust*, the testator, claiming and acting as trustee under the will, received funds and property which were never reclaimed from him, and for which he was under the same moral and legal obligation to account, that he would have been if there had been, before his acceptance of the trust or subsequently, a formal probate of the will creating the trust. If any inference unfavorable to the decree could be drawn from the fact that the court of probate allowed far less than the whole amount, the answers afford a full explanation, removing such inference. Neither the testator, if the suit had been prosecuted against him, nor the administrator could deny the title of the *cestui que trust* to the property and funds which he received as trustee. The principle is general, if not universal, that after an acceptance of a trust, and obtaining possession of property or funds in the capacity of trustee, which has not been reclaimed from him by a title paramount, a trustee will not be heard to deny the validity of the trust, or the title of the *cestui que trust*. It is but another expression of the settled principle that trustees

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shall not take advantage of their relation to obtain, at the expense of the *cestui que trust*, a personal benefit.—*Godwin v. Yonge*, 22 Ala. 553; *Foscue v. Lyon*, 55 Ala. 440. Whether Mrs. Randle was under the will of her grandfather entitled to the funds received by the testator as trustee, could be important only, if they had been claimed adversely to her. No such claim having been made, the testator was bound to account to her for them. We find in the record no reason for impeaching the decree in her favor, as a just claim against the testator, to the extent it was allowed by the court of probate.

The estate of a testator, real and personal, is primarily chargeable with the payment of debts. Until these are satisfied, legatees of no class or character, can lay any claim to the assets, or compel the personal representative to appropriate, or give security for their appropriation, to their satisfaction. It is of the essence of the title of the appellee, that the assets in the hands of the administrator, or with which he is legally chargeable, should be sufficient for the payment of the debts, and an excess remaining on which the legacy claimed, is a primary charge. If it appears the assets are insufficient for the payment of debts, her title to relief necessarily fails. The court can not compel the administrator to give security for, or to pay into court, funds for the satisfaction of the legacy, when it becomes due and payable, which the law compels him to apply to the satisfaction of debts. The debts have been established by the judgment of a court of competent jurisdiction, in the course of proceedings authorized by law, and the only proceedings to which the creditors could resort. In the absence of fraud or collusion, this judicial ascertainment of the existence and validity of the debts against the administrator, is evidence against the appellee. The administrator was clothed with the legal title to the personal assets; the appellee, a pecuniary legatee, had an equity, and the relation between her and the administrator was that of trustee and *cestui que trust*. If any valid defense to the debts was shown, and it was shown the executor was wanting in diligence in preferring it, he could not protect himself against liability. But there is want of any substantial objection to the debts, and the assets of the testator, real and personal, stand charged with their payment. If these assets are exhausted in payment of the debts, the appellee must yield obedience to the inflexible maxim of the law, commanding that justice be done, before generosity can be consulted.

The decree of the court of probate for the sale of the land of the testator, may be void, and the legacy may be charge-

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able on the lands. But if the decree is void, it is only as to the devisee, in whom the title resided. If she does not complain of it, the appellee can not, unless it was shown its invalidity was of injury to her. Injury to the appellee could not result, unless it was shown the sale of the lands under the decree was for a sum disproportionate to their value, or that there had been a misapplication of the proceeds of sale. The lands were sold for their full value, and the devisee, the only party adverse to the personal representative in the application for an order of sale, acquiesces. The proceeds of sale have been partially applied to the payment of debts judicially ascertained, creating in any event an equity in favor of the purchasers to compel a confirmation of the sale, or to charge the lands with so much as they have paid. There is no averment that the full value of the lands was not realized by the sale, and no averment that more could be realized by a re-sale. Why should the sale be disturbed at the instance of the appellee? If there are assets in other States, chargeable with the legacy to the appellee, the grant of administration to the appellant has no extra-territorial operation, does not extend to them, and except so far as he may have received, he is not chargeable with them. So far as he has received, he has accounted to the creditors, who had the paramount right. It is, without doubt, apparent and conclusive that the estate of the testator was insufficient for the payment of debts. There was, consequently, no relief the court could grant to the appellee. The original bill should have been dismissed. A decree must be rendered, reversing in all things the decree of the Chancellor, dismissing the bill of the appellee, and taxing her next friend with the costs in the Court of Chancery, and with the costs of this appeal.

STONE, J., not sitting.

Norman et al. v. Harrington, Ex'r.

Bill in Equity to Subject Lands.

1. *Vendor's lien ; when created.*—If one tenant in common sells to another an undivided interest in the lands held by them in common, the vendor has a lien on the interest sold, for the unpaid purchase money.

2. *Statutory separate estate ; what within husband's power of investment.*—A purchase of land by husband and wife, the latter having a statutory separate

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estate, in the name and for the use of the wife, is not without the scope of the husband's power of investment over such estate ; and if the purchase money be not paid, the vendor has a lien, which may be enforced by a sale of such lands; and the wife is not entitled to be first reimbursed out of the proceeds, the monies of her statutory separate estate used in making part payment of the purchase money.

3. *Partition by tenants in common ; vendor's lien on, to what attaches.*—Where, on partition between tenants in common of lands, in which each was seized of an undivided half interest, one is allotted more than his share in acreage and value, executing his note therefor to the other, such co-tenant is a vendor as to such excess in value, but his lien attaches only as to such excess, and not to the entire tract allotted ; and the particular land in excess not having been ascertained, but the number of acres in excess, in which the vendor parted with his half interest, being determinable from the price agreed to be paid, the vendor is entitled to a lien on one-half interest, or such a number of acres, equivalent to a lien on half that number of acres of the average value of the land allotted the vendee.

APPEAL from Colbert Chancery Court.

Heard before Hon. H. C. SPEAKE.

This was a bill filed by the appellee, Sam'l J. Harrington, as the executor of Benjamin Wilson, against the appellants, Jane L. Norman and Felix G. Norman, her husband, and sought to subject certain lands then in the possession of appellant, and claimed as part of her statutory estate, to the payment of certain notes made by the appellants to his testator. The material facts may be thus stated : In the year 1857 Benjamin Wilson and Felix G. Norman purchased a large tract of land from one Malone, who, in 1862, made a joint deed to them. Afterwards, in 1866, by agreement of Wilson, this deed was surrendered to Malone, who executed a joint deed to Wilson and Jane L. Norman, it being understood that the land had been paid for with money which formed part of the statutory separate estate. In 1865, Norman and wife and Wilson entered into a written agreement to divide the lands, under which the lands were divided, and their value ascertained by two disinterested persons. The larger and more valuable portion of the lands were assigned to Norman and wife, and soon after they took possession of the portion assigned to them. To pay Wilson for the difference in the value of the lands, Norman and wife executed to him on the 16th day of September, 1865, three promissory notes, each for the sum of thirteen hundred and eighty dollars, payable with interest from date, in one, two and three years. These notes recite that they were given for difference in value of the two portions of land as divided. This agreement was not witnessed or acknowledged, and in 1870 a copy of it was regularly acknowledged by Norman and wife, and about this time they made a deed to Wilson for the part assigned to him. No deed was ever made by Wilson to Norman or his wife, and the notes given by them

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in 1865 were never paid. In the division as made under the agreement in 1865, the whole tract of nine hundred and seventy-six acres was valued at twenty dollars per acre, and the notes then given were for the excess in quantity at that price.

The Chancellor decreed that the undivided half interest in the land so assigned to Norman and wife was liable to the payment of the notes made to Wilson, and made an order of sale. From this decree Norman and wife appeal.

J. B. MOORE, for appellants.

WATTS & SONS, *contra*.

STONE, J.—A sale by one tenant in common to another, of an undivided interest in lands held by them in common, arms the vendor with a lien on the interest sold for the unpaid purchase money.—*Relfe v. Relfe*, 34 Ala. 500; *Buford v. McCormick*, 57 Ala. 428, and a purchase of lands by husband and wife, the latter having a statutory separate estate, in the name, and for the use of the wife, is not without the scope of the husband's powers of investment over the wife's property so held; and if the purchase be on credit, the vendor has a lien on the land sold, for the amount of the purchase money that is not paid.—*Marks v. Cowles*, 53 Ala. 499; *Sterrett v. Coleman*, December term, 1876. It results from these principles that the complainant below was entitled to relief.

In the measure of relief the Chancellor erred. The transaction and trade between Wilson and Mrs. Norman, of date August 15th, 1870, were not simply a purchase by the latter of an undivided half interest in the lands lying south of the agreed dividing line. It was, in part, a partition by agreement. To the extent that Wilson's interest south of said dividing line equalled Mrs. Norman's interest in the tract north of the line, there was no sale or purchase. This was partition only to the extent that the portion allotted to Mrs. Norman, exceeded in value the partition allotted to Wilson. Did she become a purchaser from him of the undivided half interest? Wilson, the vendor, has a lien only on the interest which he sold. Taking the notes given as a guide, the actual purchase was of an undivided half interest in 414 acres, if the purchase price was twenty dollars per acre, as it seems to be. The location of that 414 acres is unascertained, because that part of the land was undivided. The entire tract was 976 acres, according to the deed. The interest liable to

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the debt is one-half of 414 acres, equal to 207 acres of the average value of the lands allotted to Mrs. Norman.

Reversed and remanded, to be proceeded in according to the principles of this opinion.

Mason v. Buchanan.

Motion by Ward to revive Judgment in favor of Guardian.

1. *Deed; consideration of, what may be shown by parol.*—Although the consideration of a deed is stated to be money paid to the grantor, it may be shown by parol that the real consideration was the extinguishment of a debt of the grantor; both considerations being of the same kind or degree, and the admission of the parol evidence not varying or contradicting the legal effect of the instrument.

2. *Guardian; power of, over choses in action belonging to ward.*—A guardian has the same power as an executor, with respect to choses in action coming into his hands for administration, and may, if circumstances render it proper, to save the ward from loss, accept property, real or personal, in payment of a judgment in his favor; and those acting with him in good faith in that respect, are discharged as fully as if payment had been made in money, though if the propriety of the guardian's action is questioned, the burden rests on the guardian to show the existence of the circumstances which vindicate his conduct.

3. *Credit; what improperly allowed.*—When a guardian having two judgments in favor of his wards, against the same person, accepts a conveyance of lands of value less than the amount of the two judgments, from such person as payment to the extent of the consideration expressed in the deed, it is error to allow the guardian full credit for the amount on one of the judgments only, in the absence of proof showing that the conveyance was accepted solely in satisfaction of such judgment.

APPEAL from Jackson Probate Court.

This was a motion by the appellant, James E. Mason, in the Probate Court, to revive a judgment rendered in said court against the appellee, James M. Buchanan, as the administrator *de bonis non* of the estate of his father, Winfield S. Mason, and in favor of one B. W. Mason as the guardian of appellant, who was then a minor. The motion alleged that the decree rendered on the settlement was wholly unsatisfied and still in full force. It appeared that Winfield S. Mason died intestate, leaving his widow, appellant, and one daughter, Frances W. Mason, as his heirs at law. B. W. Mason was also guardian of said Frances, and a decree in his favor as her guardian had been rendered against appellee, Buchanan, on the settlement of his administration. The appellee pleaded payment of the decree, and in support of his plea he offered in evidence the record of a deed from himself and wife to B. W. Mason, which, for the consideration of one

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thousand dollars, conveyed to said Mason certain real property. This deed was objected to, on the ground that it was illegal and irrelevant: 1. Because the original deed had not been produced, or its absence accounted for. 2. Because it had not been shown that the deed had been accepted by the guardian of appellant. 3. Because the only purpose for which the deed was introduced, was to show by and in connection with parol testimony that the consideration therein expressed was not paid in money, but was, in fact, paid by giving credit on the judgment in favor of Mason as guardian of appellant. The court overruled the objection, and admitted the record of the deed, and appellant excepted. The defendant then showed, by parol testimony, that the guardian of appellant and his sister had taken possession of the land conveyed by said deed, and had rented out the same, in connection with other property belonging to them, until his death, and that the succeeding guardian had also taken possession of and rented the premises. It was not shown that the judgment rendered in favor of Mason, as guardian of Frances W. Mason, had ever been paid. The Court of Probate ordered a credit for the sum of one thousand dollars, as of the date of the execution of the deed, to be entered on the decree, and revived the decree as to the remainder, in the name of appellant. The admission of the deed and the decree rendered, are now assigned as error.

CLOPTON, HERBERT & CHAMBERS, HUNT & TALLY, and W. H. NORWOOD, for appellant.

ROBINSON & BROWN, *contra*.

BRICKELL, C. J.—It is not necessary to pass severally on the various objections to evidence, shown by the bill of exceptions. There was sufficient evidence of the acceptance of the deed by the guardian of the appellant, and as it was acknowledged and recorded according to the statute, a transcript of the record, without producing the original, was evidence for the appellee.—Code of 1876, § 2154. Though the recital of the consideration was money paid, there was no objection to parol evidence that it was not money, but the extinguishment of a debt of the grantor. The two considerations are of the same kind and degree, and in the absence of fraud, either may be shown as the real consideration.—*Eckles v. Carter*, 26 Ala. 563; *Hair v. Little*, 28 Ala. 236.

The decree having been rendered in favor of the guardian, he was charged with the duty and authority of collecting it, as he was of all other choses in action of the ward. Over

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the personal assets of a ward, a guardian had at common law a large authority. He could sell or transfer them, and those dealing with him fairly and justly, were protected though his intent was fraudulent, or he may have been negligent in the exercise of his authority.—*Fields v. Schieflin*, 7 Johns. Ch. 150; *Bank of Virginia v. Craig*, 6 Leigh, 428; *Woodward v. Donally*, 27 Ala. 198. The statutes have, in some respects, abridged the power of the guardian to sell the personal assets, requiring that sales shall be made under orders or decrees of the Court of Probate from which he derives his appointment, but they have not diminished his power to collect or discharge the choses in action of the ward. As to these, he may exercise the power which an executor or administrator may exercise over choses in action, coming to his hands for administration. A want of diligence in the exercise of the power will render him liable, but third persons dealing with him in good faith, are not the guarantors of his prudence; they answer only for their own fair dealing. Circumstances may require that he should accept in payment, property, real or personal, to save the ward from loss. There is no want of power on his part, and if those who pay him act in good faith, the debt is as fully discharged as if the payment had been made in coin. When real estate is accepted by a guardian in payment of a debt due the ward, it is not regarded as a conversion of personal into real assets, but rather as an expedient or mode of collecting a debt.—*Foscue v. Lyon*, 55 Ala. 440. Whether such expedient should be adopted, rests in his discretion. If adopted, it is at the peril of vindicating it, if the ward should subsequently question the propriety of his conduct. Bonds with sureties are required of him to protect the ward against his improvidence, as well as his willful misconduct. But whether he is diligent or not as to the debtor, if he is guilty of no fraud, or collusion, the debt is discharged.—*Warring v. Lewis*, 53 Ala. 62. In the present case there is no room for the imputation of fraud or collusion, to the guardian or debtor; nor are facts shown which would charge the guardian with a want of diligence. The Court of Probate did not, consequently, err in holding that the decree was satisfied to the extent that the conveyance of the real estate was accepted as satisfaction.

The evidence, however, most strongly tends to show that the conveyance was executed not solely in payment of the decree in favor of appellant, but in payment also of a similar decree in favor of his sister, Francis W., of whom B. W. Mason was at the time guardian. There is no evidence that the latter decree was otherwise paid, and the guardian seems to have rented the real estate after its conveyance, as he did

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other real estate held jointly by the appellant and his sister. Without evidence that the conveyance was accepted solely in satisfaction of the decree in favor of the appellant, the court should not have applied exceeding one-half of the consideration to the payment of that decree.

For this error the decree must be reversed and the cause remanded.

Mayberry & Co. v. Morris.

Garnishment.

1. *Commercial paper ; effect of transfer of.*—The transfer of negotiable paper, passing the legal title, made in good faith, and before maturity, founded on a valuable consideration, and without notice, creates in the transferee an original and paramount right of action against the makers, cutting off all legal and equitable defenses to which it may have been subject while it remained the property of the person to whom it was first delivered, and its negotiability is not affected, because it is payable to the order of the makers, and by them endorsed in blank.

2. *Same ; what sufficient consideration for transfer of.*—The transfer of a negotiable paper, in payment of a pre-existing debt, is according to the known and usual course of business, and is founded on a valuable consideration, entitling the transferee to protection against equities and defenses to which the paper may have been subject between the original parties.

3. *Garnishment ; when title of transferee of negotiable paper sought to be subjected, superior to lien of.*—Where the debt sought to be garnished is evidenced by negotiable paper, payable to the order of the makers, and by them endorsed in blank, which, at the time of the service of the garnishment, is in the hands of the judgment debtor, a transfer of such paper by the judgment debtor after the service of the writ to a third party, if made upon a valuable consideration, and without notice, before the maturity of the paper, clothes the transferee with a title superior to any right of the plaintiffs acquired by the issuance of the writ ; the doctrine of *lis pendens* has no application to such a case.

APPEAL from Henry Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The appellants, B. Mayberry & Co., at the Spring term, 1876, recovered a judgment against one Wechsler, and, on this judgment, they sued out a writ of garnishment, which was served on the garnishee on the 21st of March, 1876, who answered admitting an indebtedness, evidenced by certain bills of exchange, made payable to their order, and by them endorsed in blank, and delivered to Wechsler. The preponderance of the testimony tended to show that these bills of exchange were in the possession of Wechsler at the time of the service of the garnishment, and remained in his hands until June or July, 1876, when he sent one of them to one

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Cohen, a resident of New York, in payment of a pre-existing debt, who gave him credit for the full amount. Wechsler did not endorse the bill of exchange, but left it endorsed in blank as received by him. Afterwards, and before the maturity of the bill of exchange, Cohen transferred and endorsed the same to the claimant, Levi Morris. Morris interposed his claim under the statute, and upon the trial of this claim, judgment was rendered in his favor.

On the trial, the plaintiff requested the following written charges : "1. That if the jury believe, from the evidence, that the writ of garnishment was served on the garnishees on the 21st day of March, 1876, and that the note was not transferred by Wechsler to Cohen until June or July, 1876, then they must find for the plaintiff, and find the note subject to their claim. 2. That if the writ of garnishment was served before the transfer of the note by the defendant to Cohen, and by Cohen to the claimant, then the doctrine of *lis pendens* applies, and the jury must return a verdict for the plaintiff. 3. If the jury believe, from the evidence, that the note in dispute was transferred to Cohen, and by Cohen to claimant after the service of the garnishment upon the makers of said note, and the consideration of said transfer was a credit upon a pre-existing indebtedness of defendant Wechsler, to said Cohen, and he to Morris, they must find for the plaintiff. 4. That if the jury believe the evidence they must find for the plaintiff." The court refused to give each one of these charges, and the plaintiff separately excepted, and assigns the same as error.

WILLIAM C. OATES, for appellant.—The statute law of Alabama confers on plaintiffs, giving bond and making affidavit, the right to seize, by process of garnishment, *any debts* due the defendant which are or may be recoverable by him in an action of debt or *indebitatus assumpsit*.—22 Ala. 760 ; 29 Ala. 330. And the service of the garnishment gives the plaintiff a lien, from the time of service, upon the debt owing by the garnishee to the defendant.—Code, § 3280 ; 38 Ala. 527. The fact that the note was not due at the time of service of the writ of garnishment, did not exempt it from the garnishment in favor of the plaintiffs, so long as it remained the property of the defendant.—12 Ala. 96. The lien thus acquired cannot be defeated by a subsequent *bona fide* transfer by the defendant to a third person, though such person is entirely ignorant of the process and its service. The power of the defendant to convey any title to the note was taken away by the service of garnishment, and the claimant is

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therefore without any title to the note.—6 Ala. 712; 11 Ala. 151; 6 Oregon, 254.

HENRY R. SHORTER, *contra*.—The paper was commercial, passed by endorsement, and a transfer of it for a valuable consideration, before maturity, constitutes the purchaser a *bona fide* holder, protected against all equities of which he had no notice. If the note had remained in Wechsler's hands, there can be no doubt that it would be subject to the garnishment; but he was in possession of negotiable paper, and the title to it was in him, and the possession and title to negotiable paper are one and inseparable. If he had the title and possession, his transfer vested the transferee with a good title, free from equities, of which he had no notice. There was nothing to put Cohen on inquiry; the note was endorsed by the payee in blank, and such endorsement authorizes any holder to fill up the blank with his own name. The consideration paid was a good and valuable one, and Morris acquired a title which is valid in all respects. The universality of the commercial law gives dignity, character, and value, and indemnity to parties holding commercial paper as innocent *bona fide* purchasers for value, &c., and the doctrine of *lis pendens* has no application to it. Even an injunction against the negotiation of commercial paper does not impair the title of a *bona fide* holder acquired during its pendency.—22 Ala. 760.

BRICKELL, C. J.—The note sought to be subjected by the garnishment, is under the statute negotiable, and governed by the commercial law.—Code of 1876, § 2094. A transfer of it passing the legal title, made in good faith, before maturity, founded on a valuable consideration, and without notice, creates in the transferee an original and paramount right of action against the makers, cutting off all legal and equitable defenses to which it may have been subject, while it remained the property of the judgment debtor, to whom it was in the first instance delivered. Its negotiable quality, from which results this peculiar incident, is not affected, because it is payable to the order of the makers, and by them endorsed in blank. The blank endorsement, any holder has the right to fill, by writing over it a direction to pay himself, or any other person. The liability of the makers and endorsers, is not thereby in any manner changed or enlarged. The endorsement and delivery of the note passes to the holder an unqualified power of disposition, and the authority to fill the endorsement, so that the person having the legal title may be designated.—2 Pars. Notes & Bills, 19;

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Pickett v. Stewart, 13 Ala. 302; *Riggs v. Andrews*, 8 Ala. 628; *Sawyer v. Patterson*, 11 Ala. 523.

The transfer of negotiable paper in payment of a pre-existing debt, is according to the known and usual course of business, and is founded on a valuable consideration, entitling the transferee to protection against equities and defenses, to which the paper may have been subject between the original parties.—*Swift v. Tyson*, 16 Peters, 1; *Bank of Mobile v. Hall*, 6 Ala. 639; *Barney v. Earles*, 13 Ala. 106.

The claimant Morris, having taken the note before its maturity, in payment of a pre-existing debt, without notice of any equities or defenses existing between the makers and Wechsler, to whom the note was originally delivered, the inquiry is, what effect upon the negotiability of the note had the garnishment sued out by the appellants, and served before Wechsler transferred, or Morris acquired it. The statutes authorizing the process of garnishment, are very general in terms; when founded on a judgment, or issued in aid of a pending suit, the words are, that it may be directed "against any person supposed to be indebted to the defendant."—Code of 1876, §§ 3218-19. When the suit is by attachment, the writ may be executed "by summoning any person indebted to, or having in his possession, or under his control, property belonging to the defendant."—Code of 1876, § 3268. A lien upon the money or effects in the possession of the garnishee, from the service of the garnishment, is declared.—Code of 1876, § 3280. The lien cannot be defeated or impaired by a subsequent *bona fide* transfer, made in ignorance of the process, or its service.—*Dore v. Dawson*, 6 Ala. 712. It is, however, inchoate, imperfect, not conferring property, or a right of property, and dependent on the rendition of judgment against the garnishee.

General as are the terms of the statutes, they have not been regarded and construed as embracing every demand which may be esteemed as a *debt*. It is only when there is a sum of money due by an agreement expressed or implied, capable of recovery in an action of assumpsit or debt, that a garnishment will reach it.—1 Brick. Dig. §§ 313-314-320. The goods of a debtor may have been tortiously taken and converted, under circumstances which give him the right to recover them back, or to recover damages of the tortfeasor, or to waive the tort, and in an action for money had and received, to recover of him the money into which he may have converted them, the law implying the promise to pay it. This demand, though in an enlarged sense a *debt*, and though if the election is made to pursue an appropriate remedy, the

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relation of tortfeasor is changed into that of a debtor, is not subject to garnishment.—*Lewis v. DuBose*, 29 Ala. 214.

The words of the statutes are, as is insisted by the counsel for appellants, broad enough to include a debt due by bill of exchange, or negotiable promissory note, equally with a debt due by a bill single, or a promissory note not negotiable. And if this paper were of the latter character; if it was not negotiable; if the law of its own policy did not favor and encourage, and facilitate its circulation, assuring the title of all who take it before maturity, upon a valuable consideration, and without notice of facts which should impair its value or negotiability; there could be no doubt that the service of the garnishment created a lien upon it which no subsequent transfer could defeat.

Whether negotiable paper because of its peculiar qualities, must not be excepted from the general words of the statutes, whether these qualities do not relieve it from all liability to garnishment, is not the question. It may be, as was said in *Mills v. Stewart*, 12 Ala. 96, that if it is not endorsed before maturity, and so long as the payee remains the proprietor of it, or if endorsed after its maturity, until the maker has notice of the transfer, it is subject to garnishment by the creditors of the payee. The case before us is that of a transfer of the paper before its maturity to a *bona fide* holder, of which the maker had notice, and the holder intervening in the garnishment suit, asserting his title as superior to the lien of the garnishing creditor, though the garnishment was served before the transfer to him.

Notwithstanding the service of the garnishment, possession of the note remained with Wechsler, the judgment debtor; and the possession of negotiable paper endorsed in blank, carries with it the title to the holder. "The possession and title are one and inseparable."—*Murray v. Lardner*, 2 Wall. 121. Possession may have been obtained, or may be retained wrongfully, still it is the evidence of the title upon the faith of which all persons dealing in good faith and for value, can acquire an indefeasible title. While it is a general rule, that all persons dealing with property which is the subject of a pending suit, can acquire from any of the parties or privies, only a title which is subject to be defeated by the judgment or decree therein rendered, the principle has not been extended to negotiable paper.—*Winston v. Westfeldt*, 22 Ala. 760; *County of Warren v. Marcy*, 97 U. S. 105. The safety of commercial transactions—and it is this the law-merchant intends to promote—has, as was suggested by Chancellor Kent, in *Murray v. Lilburn*, 2 Johns. Ch. 441, imposed this limitation on the principle of *lis pendens*. It may

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be admitted, that the appellants acquired a *lien* on the note by the service of the garnishment; but it was a frail, uncertain *lien*. It was of no greater dignity, or operation, than the right they would have acquired, if Wechsler had by an instrument, separate and distinct from the note, (of which the note afforded no evidence,) transferred it to them. Such a transfer would have created at best but an equity, and it would have prevailed, if in bad faith Wechsler had controverted it. But Wechsler retained possession of the note, and that possession afforded to the world such evidence of right, that all having no notice of an adverse claim could, and were invited to deal with him. In all controversies with the makers, the right and title of the *bona fide* holder must prevail, whatever may be the latent equities, or legal defenses, of which the paper affords no evidence. No other principle can be recognized, unless negotiable paper is shorn of all the qualities which give to it a peculiar value, and invite transactions upon its faith. When the garnishment was sued out, the appellants must have known the character of the indebtedness of the garnishees, or if they did not then know it, the answer furnished them conclusive evidence of it. We say conclusive evidence, because the truth of the answer was not controverted. The appellants then stood, and the effect of the garnishment was, to substitute them to the place of Wechsler, save so far as there had been fraudulent transactions between him and the garnishees. Subsequent frauds of Wechsler, in which the garnishees do not participate, cannot subject them to liability to appellants. A judgment cannot, and ought not to be rendered against a garnishee, unless it will shield him from any demand of the judgment debtor, or those claiming under him. The judgment cannot protect him against a right and title which is independent of, and paramount to that of the judgment debtor—a right and title which the law enables the debtor to confer in pursuance of a well defined public policy, in opposition to its own maxims, in reference to any and all other species of property. The very nature, import, and legal obligation of negotiable paper, is not to pay a particular person but to pay whoever may be its *bona fide* holder at maturity, and to pay him absolutely and at all events. In its structure and form, and the character of its obligation, it is essentially distinguishable from a promise to pay a particular person, a particular sum, which is so hemmed and circumscribed, that it cannot pass without putting in inquiry all who touch and deal with it. The principle is, therefore, well settled, that if a garnishment will reach negotiable paper, before the rendition of judgment against the garnishees, it

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must be affirmatively shown that the note had become due, and was still the property of the payee, or of the holder, as whose property the garnishment is intended to condemn it. Drake on Att. §§ 582-92. No other principle will afford protection to the garnishees, and preserve the title of the *bona fide* holder. It may be, as is argued, that thereby the attachment, or the judgment debtor can, by transferring the paper, perpetrate a fraud on the law and on his creditors. But it is against his frauds, the law intends to protect the *bona fide* holder; and the latter has a good title, though the possessor transferring acquired possession by fraud or by theft. The negotiable quality of such paper, that which gives it a greater value than any other chose in action, would be in a great measure destroyed, if any other doctrine was maintained. There is no greater reason for protecting the attaching creditor against the frauds of the debtor, than for protecting the true owner against the fraud of his bailee or agent to whom he may have entrusted the paper; or, against a disposition made by one obtaining the paper feloniously. The claims are all subordinate to the paramount policy of the law, which encourages and facilitates the circulation of such paper, and invites the negotiation upon the faith of its possession.

The Circuit Court, in its rulings to which exceptions were reserved, conformed to these views, and the judgment must be affirmed.

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Bastardy Proceedings.

1. *Bastardy proceedings; who may compromise.*—The mother of a bastard, after she has commenced proceedings against the putative father, may compromise the case and dismiss the prosecution, and a *bona fide* compromise is a bar to the further maintenance of the prosecution.

2. *Same; compromise of, presumption as to.*—The compromise of a bastardy prosecution is not an admission by the defendant of his guilt; and the jury should, on request, be instructed that they were not authorized to infer the guilt of defendant, because he entered into a compromise.

APPEAL from Jackson Circuit Court.

Tried before Hon. LEWIS WYETH.

This was a bastardy proceeding, commenced against the appellant, John Martin, before a justice of the peace, by one Cynthia C. Barnes. The justice having found appellant to

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be the father of the bastard, bound him over to appear at the next term of the Circuit Court.

On the trial in the Circuit Court, the said Cynthia having testified that appellant was the father of the child, he pleaded that since the proceedings had been commenced, the prosecutrix had entered into a compromise with him, whereby, for the sum of two hundred and fifty dollars, she had agreed to dismiss the proceedings against him. It was shown that the defendant and L. C. Coulson, the attorney for the prosecutrix, had entered into the compromise, and he testified that the prosecutrix had given him authority to compromise the matter as he thought best, and that under such authority he had entered into the compromise with the defendant above set out; that he had been paid fifty dollars, and that two notes for the sum of one hundred dollars each, had been given him; that he had informed the prosecutrix of his action in the matter, and had given her the two notes, and that she then expressed her satisfaction at the result, and asked him to retain them in his possession and collect them as they matured. The prosecutrix testified that she authorized the said Coulson to compromise the matter for the sum of three hundred dollars, and that when the notes were shown her she neither assented nor dissented, and that she had never ratified or affirmed his action in taking them; that she carried the notes to the solicitor, who informed her that the case could not be settled in that way, and that she then went on with the prosecution. This was, in substance, all the evidence.

The defendant requested the court, in writing, to charge the jury, "that they have no right to look to the fact that defendant agreed to pay to the relator, Cynthia C., a sum of money in consideration of her dismissing this suit and foregoing any further prosecution against him, as constituting any evidence of his guilt; he had a right to buy his peace without in any manner admitting his guilt, and the jury have no right to put such a construction on this proof." The court refused this charge, and the defendant excepted. He also asked the following written charge: "If the jury find from the proof that Cynthia Barnes, either by herself or any one having authority from her, entered into a contract with the defendant, for a valuable consideration, wherein and whereby she agreed that she would dismiss the prosecution at her own cost, then, if she was twenty-one years old at the time of making said contract and no fraud was practiced on her, she is bound by said contract and can not further maintain this suit, and if the jury find these facts to be true they must find for the defendant." This charge the court refused

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to give, and defendant excepted. The refusals to charge as requested are now assigned as error.

ROBINSON & BROWN, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—In *Wilson v. The Judge of the County Court of Pike*, 18 Ala. 757, Chief Justice Dargan, delivering the opinion of the court, said: "But for the decisions heretofore made by this court, I should be very reluctant to hold that the mother of a bastard, after she had instituted proceedings against the putative father, could compromise the cause and dismiss the prosecution. I, however, admit that the law is settled in this State that she can, and we can not hold otherwise without overruling decisions that have for a long time been acquiesced in." The court cited in support of this view *Robinson v. Crenshaw*, 2 St. & Por. 276; *Ashburne v. Gibson*, 9 Por. 549. The same principle is reaffirmed in the case of *Merritt v. Fleming*, 42 Ala. 234. We do not feel at liberty or inclined to depart from, or weaken this principle, which has stood so long as the law of this State.

There was a disputed question in the court below, whether the attorney, in concluding a compromise with defendant, exceeded the authority conferred. According to his testimony he did not; but according to the testimony of the mother of the bastard he did. Whether the mother, on being informed of the terms of the compromise, acquiesced in it, was also a question which should have been, and we suppose was, submitted to the jury. These were questions of fact, arising under this line of the defense, which the jury alone could determine under proper instructions from the court.—1 Brick. Dig. 55, § 26. The second written charge asked by defendant should have been given.

The first charge asked for the defendant should also have been given. A compromise made or offered, is not evidence of the justness of the claim agreed or offered to be compromised. Parties sued, or against whom a claim is preferred, may purchase their peace, or otherwise compromise such claim; and if in such negotiation they make no admission of fact material to the maintenance of the claim asserted, such offer or promise can not be received in evidence that the claim made was just.—1 Brick. Dig. 838, §§ 479, 480, 481; *Courtland v. Tarlton*, 8 Ala. 532; *Ex parte Grantland*, 29 Ala. 69.

Reversed and remanded.

[Miller v. Voss, Taylor & Co.]

Miller v. Voss, Taylor & Co.*Bill in Equity to foreclose Mortgage.*

1. *Equitable separate estate; what creates.*—A deed to a wife which conveys property directly to her, for her “sole and proper use, benefit and behoof,” creates in her an equitable separate estate, which she may bind by her contracts, or alien in any manner she sees fit.

2. *Case overruled.*—The case of *Bowen v. Blount*, 48 Ala. 670, overruled.

3. *Case doubted.*—The court declines to follow the decision in *Lippincott v. Mitchell*, 4 Otto, 766.

APPEAL from Mobile Chancery Court.**Heard before Hon. H. AUSTILL.**

The appellees, Voss, Taylor & Co., filed this bill against the appellant, Mary Ann Miller, and sought to foreclose a certain mortgage executed by the appellant and her husband to A. A. Voss and Peter Hawes, and by them transferred to W. H. A. Voss, and by him transferred to appellees.

The appellant deduced title to the premises in question by deed to her from one Peter Odermott and Rosanna Odermott, his wife. The *habendum* clause in this deed is as follows: To have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to the sole and proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever. The appellant demurred to the bill, on the ground that it plainly appeared from the deed of Odermott to her, that she had a statutory separate estate in the lands in question, and that such estate could not be conveyed by mortgage. This demurrer was overruled. Upon final hearing the Chancellor decreed that the complainant was entitled to relief, and ordered a sale of the mortgaged premises to pay the debt. The overruling of the demurrers and the decree rendered are now assigned as error.

JOHN ELLIOTT and JAMES BOND, for appellant.—The deed of Odermott to appellant does not create in her an equitable separate estate.—*Short v. Battle*, 52 Ala. 456; *Lippincott v. Mitchell*, 4 Otto, 767; *Connor v. Williams*, 57 Ala. 131. The *habendum* clause in that deed was the same as that construed in 4 Otto, 767, and there held to create a statutory separate estate. In *Short v. Battle*, 52 Ala. 456, this court ruled, that where the intent to exclude the marital rights of the husband

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is doubtful or equivocal, or rests on speculation, the statute intervenes and fixes the character of the estate as the statutory separate estate of the wife. The decision in 4 Otto, 767, is based on that case, and these decisions are conclusive of the question.

OVERALL & BESTOR, *contra*.—The Odermott deed to Mrs. Miller created in her an equitable separate estate, which she could bind by her contracts, to the same extent as if she were a *femme sole*. The words of the *habendum* clause of that deed are “to the *sole and proper use, benefit and behoof*.” The word *sole*, is plainly one that excludes the marital rights of the husband, and if it plainly appears from the deed that his rights are excluded, the estate created by the deed is equitable.—See *Short v. Battle*, 52 Ala. 456; *Williams v. Maull*, 20 Ala. 721; *Anderson v. Brooks*, 11 Ala. 953; 26 Ala. 213; 54 Ala. 688.

STONE, J.—The question, what words in a conveyance to a married woman will create in her an equitable separate estate, and thus exclude the common law marital rights of her husband, has been a great many times before this court. It has always been ruled that, while in the absence of an express different intention, the husband's marital rights will attach to property conveyed to the wife, or to a trustee for her, yet no particular form of words is necessary to create a separate estate in the wife. If the conveyance shows that the wife should have the use and enjoyment, to the exclusion of the husband, that is enough. In the case of *Newman v. James*, 12 Ala. 29, the deed to Mrs. Newman was “to her and her heirs, to have and to hold the same to and for her use, benefit and right, and of the heirs aforesaid, without let, hindrance, or molestation whatever.” Held, to create an equitable separate estate in the wife. In the case of *Anderson v. Brooks*, 11 Ala. 953, the deed was needlessly verbose. The conveyance was to a trustee, “for the sole use, benefit and behoof of the said Narcissa A. and her children.” Speaking of this deed, this court said: “It explicitly declares that the gift is for the sole use, benefit and behoof of Mrs. H. and her children; and this declaration, so far from being weakened by what precedes or follows, is really strengthened. The authorities all show that the terms employed invest the wife and her children with the beneficial estate, independent of the marital rights of her husband.” The word *sole*, was the word of exclusion in the deed construed in *Anderson v. Brooks*. In the case of *Williams v. Maull*, 20 Ala. 721, the bequest was to the executors in trust “for the use of the

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said Mary Maull during her natural life, and then for the heirs of her body forever," with a bequest over, in case the said Mary should depart this life without leaving issue. There were words which excluded the labor and increase of the slaves from the debts of the husband. This case is an authority for the proposition, that where the conveyance is so worded as to exclude the husband's marital rights, their effect is not impaired by the fact that children also take a beneficial interest under the instrument. See, also, *Strong v. Gregory*, 19 Ala. 146. In the case of *Ozley v. Ikelheimer*, 26 Ala. 332, the conveyance was to "Barthena Ozley, for the respect that said Cross has for her and her heirs, to have and to hold for her own use and benefit alone." There was a controversy as to the execution of the deed by the grantor. This court said, "If the deed had been executed by Cross, there is no doubt that it would have created a separate estate in Mrs. Ozley, the property being limited to her use *only*, which would exclude the husband as effectually as if the term 'separate' had been employed." See, also, the strong case of *Jenkins v. McConnico*, 26 Ala. 213. In *Pickens & Wife v. Oliver*, 32 Ala. 626, this court ruled that the deed under which Mrs. Pickens claimed title, created in her a separate estate. Neither in the report of that case, nor of the same case when first presented to this court, (29 Ala. 528,) are we informed what were the terms of the deed. The later case, *Caldwell v. Pickens*, 39 Ala. 514, contains a copy of the deed, and again affirms that it created a separate estate in Mrs. Pickens. The language of the conveyance is, to "the said Margaret Pickens and to her bodily heirs, to have and to hold the said female negro slave with her future increase, to the only proper use and behoof of the said Margaret Pickens and her bodily heirs, executors, administrators and assigns forever." In the case last cited is a collection of authorities bearing on that question, and the word 'only' is made the pivot on which the decision turns. See a synopsis of the Alabama decisions bearing on this question, 2 Brick. Dig. 81; *Cont. Life Ins. Co. v. Webb*, 54 Ala. 688, 701. In *Connor v. Williams*, 57 Ala. 131, we held, following our former rulings, that the words, "to have and to hold the premises hereby conveyed, to herself and her heirs forever, for their own proper use and benefit," do not create an equitable separate estate. In that case we noted the distinction between the word 'own,' on the one hand, and the several words 'only,' 'alone,' 'sole,' 'separate,' &c., on the other. The language of the deed in this case is, "To have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns,

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to the sole and proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever." Under all our decisions, these words must be interpreted as vesting an equitable separate estate in Mrs. Miller; and the machinery employed to divest the title of the husband, and transfer it to the wife, does not weaken, but tends to strengthen this view.

Our attention has been called to the case of *Lippincott v. Mitchell*, 4 Otto, 766, which presented in the *habendum* clause of the deed the identical language found in this. In that case the Supreme Court of the United States adjudged that the words did not create an equitable separate estate. We do not feel at liberty to overturn all our own rulings, and follow that case. The case of *Fisk v. Stubbs*, 30 Ala. 335, was entirely unlike the present one. That deed contained no words that could exclude the husband's marital rights; and there was no controversy as to the character of separate estate of which the wife was seized. The sole controversy was whether the deed, under the circumstances disclosed, could have any operative effect whatever. It was ruled to be a valid conveyance against Fisk, the husband; and the subsequent conveyance of Fisk and wife to Stubbs was set aside for duress. That case should exert no influence in the decision of this. If the case of *Bowen v. Blount*, 48 Ala. 670, be in conflict with these views, we overrule it and follow our other rulings stated above.

The decree of the Chancellor is affirmed.

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Action on Tax Collector's Bond.

1. *Act of April 19, 1873; second section of, construed.*—The act to keep in each county a proportionate share of the public school money, approved April 19, 1873, by its second section required the tax collector of each county to pay over, at the end of each month, to the county treasurer, all poll taxes collected during the month, taking the county treasurer's receipt, or duplicate, approved by the probate judge, &c., which shall be received as cash in his settlement with the Auditor. The same act, in another section, provided that, before any money should be paid to the county treasurer, he should increase his bond to such an amount as shall be authorized by the superintendent of public instruction.

The tax collector, as required by the second section of the act, paid over to the county treasurer, at the end of each month, the poll taxes collected during the month, taking the receipts prescribed by that section, without any knowledge that the treasurer had not increased his bond.

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Held: Although as between the treasurer and the sureties on his general bond, the latter were not liable for payment of poll taxes made to the treasurer before increasing his bond, as required by the act, yet the failure of the treasurer to give such increased bond, without more, did not, *proprio vigore*, vacate his office, and he still remained an officer *de jure*; and the statute not imposing upon the tax collector the duty of ascertaining whether such increased bond had been given, he had the right to presume that the authority charged with exacting such bond, had properly performed its duty, and in the absence of information to the contrary, was discharged by payments of poll taxes made in good faith to the county treasurer; though under the inconsistent provisions of the statute, the treasurer, as between himself, his general sureties and the State, could not rightfully receive payment of such taxes until he had given the increased bond.

APPEAL from Morgan Circuit Court.

Tried before Hon. W. B. Wood.

The opinion states the case.

CLARK & HARRIS, and J. B. MOORE, for appellants.

RATHER & SHARPE, and C. F. HAMILL, *contra*.

STONE, J.—The act “to keep in each county of this State a proportionate share of the public school money,” was approved April 19, 1873.—Pamph. Acts 1872–3, p. 6. The second section of that statute declares, “that each tax collector shall, at the end of every month, pay all poll taxes collected during such month to his county treasurer, and take his receipt for the same in duplicate, endorsed and approved by the probate judge of his county,” &c. Section 7 declares, “that before any money shall be paid over to the county treasurer, under this act, such treasurer shall increase his official bond to such an amount as shall be authorized by the superintendent of public instruction,” &c.

The appellant, Woodall, was tax collector of Morgan county, and as such collector, he paid over to Morrow, the county treasurer, poll tax moneys collected by him, conforming in all respects to the statute, except that Morrow, the treasurer, had not increased his bond as required by section 7 of the act. Morrow, failing to account for this money to the county superintendent of education, the latter brought suit against him and his general sureties as county treasurer, to recover the same. We held that his general sureties were not liable for this default.—*Morrow v. Wood*, 56 Ala. 1. Thereupon the county superintendent instituted this suit against the tax collector and his sureties, alleging that the payment to Morrow was unauthorized and illegal, and therefore no payment in law. The question is thus presented, did the payment to Morrow absolve the tax collector from further liability to account for this money?

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Whose duty was it to see that the treasurer increased his official bond?

There can be no question that at the time Woodall paid the money over, Morrow was the county treasurer of Morgan county—not *de facto* merely, but *de jure*. He had given bond as such, and the office was full. None other could have been appointed while he thus held the office. His failure to “increase his official bond,” may, and probably would, have been sufficient cause for his removal, on proper proceedings, but it did not, *proprio vigore*, vacate his office. Hence, the powers of an officer *de facto*, need not be invoked or inquired into.

The statute under discussion does not, in terms, inform us whose duty it was to see that the treasurer increased his official bond. The superintendent of public instruction was required to fix the amount of the bond. The bond was to be increased “to such an amount as shall be authorized by the superintendent of public instruction.” This is the language of the statute, and was the first duty to be performed. The next step, or duty, was to be performed before the judge of probate. He was to approve the bond, and forward a certified copy to the superintendent of public instruction. The statute makes no provision for notifying the tax collector that these duties have been performed, or the contrary. No function or duty in reference to the execution of this bond is cast on the tax collector. It is imposed on other officers. The second section of the act, as we have shown, provides that at the monthly payments made by the collector of the poll taxes, collected during the month, he shall take the treasurer’s “receipt for the same in duplicate, endorsed and approved by the probate judge of his county, and the tax collector shall immediately forward one of these receipts to the State superintendent of public instruction, and a similar receipt shall be received as cash in the settlement of his accounts with the State auditor.” Several important inquiries may arise here. First, why require the duplicate receipt of the treasurer to be endorsed and approved by the probate judge? Why require one class of payments made to a bonded public officer, to be endorsed and approved by another public officer; and that other public officer the identical one on whom the law cast the duty of approving the additional bond required of the treasurer, as a condition precedent to his right to have this particular fund paid over to him? The probate judge, when he endorsed and approved these several payments to the county treasurer, had actual knowledge whether or not the increased bond had been executed by the latter officer; while it is not averred or pretended that the tax collector had such knowledge. Both the

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superintendent of public instruction and the probate judge are public officers. The law made it the duty of the former to prescribe, and of the latter to approve the bond; and the presumption is that public officers do their duty.—*Brandon v. Snow*, 2 Stew. 255; *Hiets v. Colvin*, 14 Johns. 182; *Hartwell v. Root*, 19 Johns. 345; *Hinson v. Barnes*, 3 Gill & Johns. 359; 12 Wheat. 70. We think the clause of the act we have been commenting on—that which requires the probate judge to endorse and approve the treasurer's receipts—strongly persuasive to show, that the legislature intended to place this as a guard and check against unauthorized payments to the county treasurer. The last clause of the section declares that such receipts, meaning, of course, so endorsed and approved, "shall be received as cash in the settlement of his accounts with the State auditor." We can not give this clause full effect without according to these "endorsed and approved" receipts, the effect of full proof, both in fact and law.

We hold that the tax collector was justified in presuming the superintendent of education and the probate judge had done their duty, and that he could lawfully pay to the treasurer the money which the statute required him to pay "at the end of every month." We are loth to adjudge an officer in default, whose only imputed offense consists in the promptness with which he paid the public school fund to the officer the statute declared should receive it. The fault, and omission of official duty, do not, in this case, rest on the tax collector.

In the case of *Morrow v. Wood*, 56 Ala. 1, speaking of this identical transaction, we said, "before the poll tax, or any part of the school fund, could be rightfully paid to the treasurer, the new and independent bond must have been executed and approved." In this case we hold, that notwithstanding the new and independent bond had not been executed, still a payment of the school fund to the treasurer absolved the tax collector and his sureties. This presents a seeming anomaly. It grows out of what we consider to be inconsistent provisions that were allowed to become embodied in the statute. We regret the loss to the school fund, but find no authority for visiting it on the tax collector, who seems to have acted in good faith.

We consider it unnecessary to consider any other question, as what we have said will probably be decisive of the case on another trial.

Reversed and remanded.

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Lehman et al. v. Lewis.

Bill in Equity to declare and enforce Resulting Trust.

1. *Resulting trust ; when arises.*—Where a purchase of lands is made through an agent, who takes title to himself, a trust will result to the principal ; or if a trustee employs the funds of a *cestui que trust*, or an agent, the money of the principal in the purchase of lands, the *cestui que trust*, or principal, may elect to hold the agent or trustee personally liable, or to follow the money into the land, or a trust of the legal estate will be declared by implication of law.

2. *Same.*—To constitute a simple resulting trust, where one person's money is used in paying for lands conveyed to another, the money must be paid at the time of the purchase ; but when a trustee thus uses trust funds, it is not essential to the *cestui que trust's* equity to charge the lands, that the money be paid at the time of the purchase. The right may be enforced, whether the payment be made before or after the purchase, so long as the trust funds can be traced into specific property, and against all persons except *bona fide* purchasers.

3. *Statute of frauds ; what trusts not within.*—Such trusts, not arising from or being dependent upon any agreement between the parties, but implied by law from the facts proved, are specially exempted from the operation of the statute of frauds.

4. *Resulting trust ; what will not create.*—Oral agreements, without the ownership of the money, though cotemporaneous with the purchase, will not create the trust ; these, though broken, if there be not fraud or imposition, are within the statute of frauds.

5. *Same ; what will create.*—If one, by way of loan, and wholly upon the credit and account of another, advance the purchase-money, taking title to himself as security for its repayment, he holds the estate upon a resulting trust for the other, and on repayment will be compelled to reconvey.

6. *Resulting trust ; what averments and proof necessary to establish.*—Where a resulting trust is sought to be established and engrafted upon a conveyance absolute in its terms, the complainant must, by his bill, distinctly and precisely aver the facts from which it is claimed to result, and the proof must correspond with the pleading, and must be clear, full, satisfactory and convincing—the burden of removing the presumption arising from the terms of the conveyance, being on the party asserting the trust.

APPEAL from Bullock Chancery Court.

Heard before Hon. B. B. McCRAW.

The opinion states the case.

STONE & CLOPTON and H. C. TOMPKINS, for appellants.—It is enacted that no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing.—Rev. Code, § 1590. By this statute, all trusts are prohibited which do not result from operation of law ; from certain facts being shown to exist, and independent of any agreement. A resulting trust

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is not founded on any contract, and a verbal agreement to purchase lands for the benefit of another is void under the statute of frauds.—13 Ill. 186; 16 Dana, 331; 4 Md. 465; 9 Watts, 32.

Locke did not occupy any fiduciary relation to the appellee, nor did he have any of her money in his hands at the time of the purchase or the conveyance. To raise an implied trust, an actual payment, or actual loan of money by the *cestui que trust* at the time of the purchase, must be shown. It is a presumption of law, and must arise, if at all, at the time of the conveyance, and the money, which is the foundation of the trust, must be then paid or secured to be paid. 2 John. Ch. 404; 5 John. Ch. 1; 2 Paige, 217–238; 16 Verm. 500; 1 Hoffman Ch. 90; 3 Ala. 302. The evidence in this case fails to show any purchase by Locke which would create a resulting trust in favor of appellee.

J. N. ARRINGTON, *contra*.—The trust set up by the appellee is not within the statute.—R. C. § 1590. It is a resulting trust, and such trusts are expressly excepted from its operation.—42 Ala. 60; Perry on Trusts, 2d Ed. §§ 137–226. The money first advanced by Locke was a loan to appellee, and it is the same as if she had advanced to him so much cash. 44 Ala. 236. The cases cited by Mr. Perry in his work on Trusts, § 133, fully establish this proposition. The trust in this case arose, not from the agreement by Locke to purchase for appellee, but from his purchase with money which was hers at the time he took the title to himself. It resulted from his acts and not from his agreement, and does not fall within the operation of the statute of frauds.—25 Iowa; Perry on Trusts, 2d Ed. § 134, and note. The appellee was in the undisturbed possession of the land at the time of the appellants' purchase from Locke, and there can be no question of *bona fide* purchaser. The cases of *Barrell v. Hamrick*, 42 Ala. 60, and *Robinson v. Robinson*, 44 Ala. 235, are conclusive of this case in favor of the appellee.

BRICKELL, C. J.—The bill was filed by the appellee, a married woman, and alleges, in substance, that in the latter part of 1869 her husband purchased for her, of one King, a tract of land, at the price of three thousand dollars. At the time of the purchase, one Henry Clark had in his hands about three thousand dollars, the statutory estate of the appellee, and her brother, M. B. Locke, was the agent for its collection. To enable her husband to make the purchase of the lands, said Locke advanced to him, as a loan to her, the purchase-money of said lands, on the agreement that he was

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to be repaid from the moneys in Clark's hands when collected; and the moneys were by him collected subsequently, and that she assented to the appropriation of the same to his reimbursement of the money loaned. The conveyance of the title to the lands was made to Locke, but of this fact the appellee avers her ignorance until after the death of Locke. On the 22d April, 1870, Locke, by absolute deed, intended as a mortgage to secure pre-existing debts, conveyed the lands to the appellants, who had commenced against the husband of appellee an action of ejectment for the recovery of possession thereof. The prayer of the bill is, that the action of ejectment be perpetually enjoined, and the appellants required to convey the lands to appellee, and for general relief.

The answer of the appellants is a general denial of all the material averments of the bill, or a general disclaimer of all knowledge or information of them, demanding full proof.

Two questions arise: 1. Whether the transaction, as averred in the bill, resting wholly in parol, creates an equity in favor of the appellee, which can be enforced. 2. Whether the evidence is sufficient to establish the equity. The statute declares, "no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created unless by an instrument in writing, signed by the party creating or declaring it, or his agent, authorized in writing."—Code of 1876, § 2199. This is a substantial reenactment of the seventh and eighth sections of the English statute of frauds, and by its terms, the creation, and consequently the proof by parol of all direct or express trusts, springing from and dependent upon the agreement of parties, not arising or resulting by implication or construction of law, is prohibited. There not being any declaration in writing of the trust now asserted, no memorandum of the agreement it is averred Locke entered into, the first question must be limited to the inquiry, whether, from the facts stated, a trust of the legal estate taken to himself by Locke, results by construction of law to the appellee.

It is the unquestionable doctrine of courts of equity, in the absence of statutes providing otherwise, that if the purchaser of lands, paying the price with his own money, takes the conveyance in the name of another, the trust of the lands results by construction to him from whom the purchase-money moves. Or, if the purchase is made through an agent, who takes title to himself, the trust will result to the principal, who advances the purchase-money. Or, if a trustee employs the funds of the *cestui que trust*, or an agent, the

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moneys of the principal, in the purchase of lands, at the election of the *cestui que trust*, or of the principal, the trustee, or the agent, may be made personally liable, or the money followed into the land, or a trust of the legal estate will result by implication of law. This class of trusts, not arising from or dependent upon any agreement between the parties, implied by the law from facts proved, are specially excepted from the operation of the statute of frauds, and it is said the exception, if not expressed, would have been a necessary implication.—*Hoxie v. Carr*, 1 Sumn. 187.

The whole foundation of this class of trusts is the payment *before, or at the time of the purchase*, of the money by the *cestui que trust*, or by the trustee, or the agent, of funds which are the funds of the *cestui que trust*, or of the principal. Mere parol agreements, or parol declarations of the purchaser that he is buying for another, or that the purchase is intended for the benefit of another, without the employment of the money of the other, will not create a resulting trust. In *Botsford v. Burr*, 2 Johns. Ch. 405, said Ch. Kent: "The trust must have been coeval with the deeds, or it cannot exist at all. After a party has made a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract, or the ground of some other relief; but it cannot, by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such trust so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the *cestui que trust*, and the deed not taken in his name. The trust results from the *original transaction* at the time it takes place, and at no other time; and it is founded on the *actual payment of money*, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever. They are to be governed by different principles, and the doctrine of a resulting trust would be mischievous and dangerous, if we once departed from the simplicity of the rule. It is a very questionable doctrine in the view of policy, even under this limitation, and it has been admitted with great caution." Following this authority, we said in *Tillford v. Torry*, 53 Ala. 122, in which a *cestui que trust* asserted an equity to follow trust funds into lands, or a resulting trust therein: "To create the equity either to charge the lands or to raise a resulting trust, a payment of the trust funds at the time of the purchase is indispensable. A subsequent payment by the trus-

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tee of the debt he may have contracted in the purchase of the lands, will not, by relation, attach any trust or lien to the original purchase."

The trust resulting at the time of the purchase, if at all, and arising from the fact that the moneys, the consideration of the purchase, is the money of the *cestui que trust*, and not of the grantee, in whom the legal estate resides, oral agreements, without the ownership of the money, though cotemporaneous with the purchase, will not create it.—Perry on Trusts, §§ 133–35. These, though broken, if there be not fraud or imposition, are within the operation of the statute of frauds.—*Kisler v. Kisler*, 2 Watts, 323; *McDonald v. May*, 1 Rich. Eq. 91; *Johnston v. Lamotte*, 6 ib. 347; *Taliaferro v. Taliaferro*, 6 Ala. 406. "Where a man employs another person by parol, as an agent, to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase-money is paid by the principal, then, if the agent denies the trust, and there is no written agreement or document establishing it, he cannot, by a suit in equity, compel the agent to convey the estate to him; for (as has been truly said) that would be decidedly in the teeth of the statute of frauds."—2 Story's Eq. § 1201. But if one should, by way of loan, and wholly upon the credit and account of another, advance the purchase-money, and take title to himself as security for its repayment, he would hold the estate upon a resulting trust for the other, and on repayment, would be compelled to convey.—Perry on Trusts, § 133; *Rathwell v. Dewett*, 2 Black (U. S.) 613; *Boyd v. McLean*, 1 Johns. Ch. 484; *Page v. Page*, 8 N. H. 187; *Runnells v. Jackson*, 1 How. (Miss.) 358; *Loundsbury v. Pursdy*, 16 Barb. 380; *Buck v. Pike*, 11 Me. 9. It is within this principle it is insisted the present case falls.

The general rule is, that when a resulting trust is sought to be established and engrafted upon a conveyance, absolute in its terms, the complainant must, by his bill, distinctly and precisely aver the facts from which it is claimed to result. The proof must correspond with the pleading, and must be clear, full, satisfactory and convincing. If the proof is uncertain; if it is doubtful and unsatisfactory, relief cannot be granted. The presumption arising from the conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond reasonable controversy. The burden of removing this presumption rests upon the party asserting the contrary, and it is not enough for him to generate doubt and uncertainty. "A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."—How-

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land v. Blake, 97 U. S. 626; *Perry on Trusts*, § 137; 1 *Storry's Eq.* § 152; 1 *Lead. Eq. Cases*, 273; *Tilford v. Torry*, 53 Ala. 120.

The verbal declarations or admissions of the grantee, in whom the legal estate resides, are admissible as evidence against him, and all claiming under him otherwise than as *bona fide* purchasers for value.—1 *Lead. Eq. Cases*, 273. Evidence of this kind is admitted to be most unsatisfactory, and is received with great caution. It is so easy of fabrication, so incapable of contradiction, and the total alteration of its effect which the slightest mistake, or failure of recollection may cause, that after the death of the grantee it will not be made the basis of a decree establishing a resulting trust, or an equity, in opposition to the terms of a conveyance, unless it is clear, consistent and corroborated by circumstances.—*Lench v. Lench*, 10 Vesey, 518; *Smith v. Burnham*, 3 Sum. 438; *Botsford v. Burr*, 2 Johns. Ch. 405; *Luelling v. Atterback*, 1 Bibb, 609; *Hatton v. Landman*, 28 Ala. 127; *Baker v. Vining*, 30 Me. 121; 2 *Whart. Ev.* § 1037.

The first inquiry of fact is, whether there was a loan to the appellee by Locke of the money with which to purchase the lands, and which were employed in the purchase. The evidence tending to prove it, comes from the appellee, from her husband, her brother, Jesse Locke, and from King, the vendor and grantor. The evidence of the appellee is, that Locke agreed to advance the first payment on the lands, and was to be reimbursed from the moneys he expected to receive from Clark. That he received from Clark, through Watts & Troy, \$1,500 in December, 1869, and \$1,500 in or about January, 1871, and that he told her it had been used in the purchase of the lands. The bill avers her ignorance of the fact that title was made to Locke until after his death, and yet she testifies that it was so made at the request and instance of her husband, without her knowledge, but that she was informed of it in December, 1869, soon after taking possession of the lands; and on complaining to Locke, he promised to have it changed and made in her name, and appointed a time at which it should be done. The deed to Locke was executed on 6th December, 1869. The evidence of the husband is, that Locke advanced the money to buy the lands, intending to reimburse himself from the money expected to be collected of Clark. Two thousand dollars of the purchase-money was paid in December, 1869, and one thousand in January, 1870. The money, he states, was the funds of the appellee, advanced by Locke, and Locke told him subsequently he had been repaid out of the Clark money. *Jesse Locke* states the lands were purchased for the appellee,

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the purchase-money advanced by M. B. Locke, and that subsequently he was told by M. B. L. that he had been repaid by the moneys received from Clark, except about five hundred dollars; that originally there was due the appellee three thousand dollars from Clark, but the attorneys' fee had reduced it to twenty-four or twenty-five hundred dollars. Neither he or the husband give any reason for the making of the deed to Locke, or state their knowledge or ignorance that it was so made. *Joseph King*, the vendor and grantor of the lands, states that he sold the lands to Locke for the appellee, and the purchase-money was paid him by Locke, who stated that it was the money of the appellee, and that he had left of her money, after paying it, four or five hundred dollars; that Locke took the deed to himself, as he said, to prevent the husband of the appellee from selling the lands and using the proceeds, or being liable to his debts, and that at some future time he would make a deed to the appellee. The deed was delivered to Jesse Locke and W. J. Lewis, the husband of appellee.

The evidence of King does not correspond with the averments of the bill, and is inconsistent with that of the appellee, her husband, and Jessie Locke. It proves that Locke, so far from loaning the purchase money to the appellee, had moneys of hers, in his hands, the amount of which was not exhausted by the purchase, and that from these moneys he paid the price of the lands. The reason which he says Locke assigned for taking title to himself, instead of to the appellee, though avowing his purpose to make her title at some future time, it is matter difficult to believe he could have asserted. Locke could scarcely have been ignorant that if the lands were purchased with moneys of the statutory estate of the appellee, they could not be made liable to the debts of the husband, nor could the husband sell them and use the proceeds of sale. Nor is this testimony consistent with that of the appellee, that Locke promised her that he would have the deed changed and made to her, placing the lands in the peril, from which he proposed to preserve them by taking the title to himself.

There is also an unexplained inconsistency between the evidence of the appellee and her husband, and that of Jessie Locke. The latter states that his brother told him he had been reimbursed the moneys he had advanced in the purchase of the lands, except about five hundred dollars, the fees of the attorneys for collecting the debt from Clark. The former states that he said he had been fully reimbursed. Chase, the book-keeper of Locke, states the purchase money of the lands was loaned to the husband of the appellee, and

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was charged to him on the books of Locke—\$2,000 on 6th December, 1869, and \$1,000 paid his note to King, January 17th, 1870, and that at the time Locke told him it was to buy the King place, as the lands seem to have been known. The money received from Watts & Troy, who collected the Clark debt, which was the debt from which the appellee, her husband and Jessie Locke say M. B. L. was reimbursed the money he had advanced in the purchase of the lands, was credited to the estate of H. T. Clark, on the books of said Locke, making him a debtor to the estate. The amount received was \$2,586 75, less \$113 25, expenses of collection. \$1,200 75 was received January 7th, 1870, and \$1,385 50 December 16th, 1870. The books of Locke show that at his death, the husband of appellee was indebted to Locke, in the sum of \$6,302 29, of which \$3,000 was the purchase money of the lands. They also show Locke indebted to the estate of H. T. Clark in the sum of \$2,473, the net proceeds of the debt collected by Watts & Troy. These entries are cotemporaneous with the transactions to which they refer, and their truth in some respects is corroborated by the undisputed facts. The first payment of the purchase money of the lands, was two thousand dollars, made on the execution of the deed, which is shown to have been December, 6th, 1869, when the husband is charged therewith. For the remainder of the purchase money, the husband gave his individual note to King, and this was paid 17th January, 1870, and charged to him.

The appellee, by reason of her coverture, was incapable of contracting a debt for money loaned, or in the purchase of lands. No promise she made, or could have made, was binding on her personally, or on her statutory estate, if any she had. If there was any loan of money made to her by Locke, and any promise by him that on its payment he would convey the lands to her, or that he would hold the lands as security for its repayment; or, that he would pay the purchase money, and reimburse himself from moneys he expected to receive of her statutory estate, the promise was not binding. There was no mutuality in the contract she was incapable of entering into it, and being incapable, Locke could not be bound by it. If from moneys of her statutory estate, Locke was reimbursed the money he had advanced, the want of mutuality in the original contract, it may be, Locke could not set up as a bar to its performance. The payment of the money to him, if it was recognized by a court of equity, would place him in the same situation he would occupy, if the appellee was *sui juris*. Is it more probable that a transaction of that character was entered into, or that

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which the cotemporaneous entries on Locke's books imports—a loan of money to the husband to purchase the lands, Locke taking title to himself to secure its payment?

The material fact that, which in any aspect of the case, the appellee was bound to prove, was that Locke had been repaid the purchase money of the lands in whole or in part. The payment, it is not pretended, was made from any other source, than from the money collected from Clark. If that money was hers, the means of proving it was in her power. If it was improperly credited by Locke to the estate of her first husband, if he received it as her agent, and in no other capacity without incurring any liability otherwise, the proof of the facts must be within her knowledge and possession. The debtor Clark, the attorneys collecting it, could have been examined. She knew the facts and could have stated them fully and explicitly. It is probable also, they were known to her husband and her brother; and yet neither of them states more than the admissions or declarations of Locke; or, generally, that the money was due to the appellee, without stating the facts which can satisfy others they are not mistaken. All cases of this kind are to be judged not only by the evidence which a party may produce, but by considering that which he could have produced. A party having more certain and satisfactory evidence in his power subjects his cause to unfavorable suspicion, if he relies upon that which is of a weaker and inferior nature. The suspicion strengthens, when he relies upon the verbal admissions of the dead, which they have not the opportunity to explain or contradict, when they have the means of producing evidence not subject to infirmative considerations.

The evidence is too uncertain, inconsistent and inconclusive, to afford that conviction which will overcome the terms and effect of a deed in writing. It may be the appellee has some equity in the lands, but she has failed to establish it; and it would be a dangerous precedent, in view of the facts of this case, to divest an estate resting upon the best evidence which the law requires, and which must be presumed true, until overcome by full, clear and convincing proofs.

The decree of the Chancellor must be reversed, and a decree here rendered dismissing the bill at the costs of the next friend of the appellee in the Court of Chancery, to be taxed by the Register, and he must pay the costs of this appeal.

STONE, J., not sitting.

[McCain et al. v. The State.]

McCain et al. v. The State.*Indictment for failing to keep Street in Repair.*

1. *Highways in municipal corporations; jurisdiction over.*—When a rural district is made the site of an incorporated town, exclusive jurisdiction and authority over the public roads and highways, theretofore existing within the corporate limits, pass to the corporate authorities.

2. *Same.*—It rests within the governmental discretion, confided to the corporate authorities, whether they will use or adopt such highways as streets; they may do so, or may alter or even abolish them as streets, as the wants of the community may require; and not having adopted such highway as a street, or having abolished it as such, they are not indictable for failing or refusing to keep it in repair.

APPEAL from Calhoun Circuit Court.

Tried before Hon. WILLIAM L. WHITLOCK.

The appellants were tried and convicted for failing to keep in repair a certain road or street in the town of Anniston, they being the corporate authorities of said town. The facts as to the situation and condition of the road which was suffered to remain out of repair, are fully stated in the opinion. The court, *ex mero motu*, charged the jury, "that if they believed from the evidence that the road described in the indictment is in the corporate limits of the town of Anniston, and was a public road when the town was created, then the corporate authorities of Anniston did not have any authority to abolish or discontinue this road; and although the jury may believe, from the evidence, that the corporate authorities of Anniston did pass an ordinance abolishing or discontinuing said road, the ordinance is not any defense to this indictment." To this charge the defendants excepted. Defendants requested the court in writing to charge the jury: "If the jury believe, from the evidence, that twelve months before the finding of the indictment the road described in the indictment had ceased to be necessary as a public highway, then the jury should find the defendants not guilty." This charge the court refused to give, and the defendants excepted. The charge given and the refusal to charge as requested, are now assigned as error.

JOHN T. HEFLIN, for appellants.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The corporate limits of the town of Anniston
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extend two miles in every direction from a named point. This gives an area of four miles across. The inhabitants are shown to be about five hundred persons. Anniston is then a small village, necessarily leaving much of its territorial area unoccupied. It was founded and incorporated only a few years ago. Before that time, this large territorial area must have been a rural settlement or district; and the proof shows that what the prosecution claims has become a street of the village, was, at the time of settlement and incorporation, a public highway or country road crossing within the chartered limits of the village, nearly or quite two miles from the business centre. Its bearing is not towards Anniston, and persons going to, or returning from the village, would not travel this road. It appears to have been a connecting line with another highway, leading from Oxford to Alexandria, rendered convenient and necessary at the time, by the fact that it was an outlet from Blue Mountain on the Selma, Rome and Dalton railroad, at which there was, at one time, a depot and steam saw mill. These have long been discontinued, and with them, it would seem, the main use of this highway. The inquiry arises, when a rural district is made the site of an incorporated town, what is the effect upon the public roads theretofore existing within the chartered limits? Are they thereby converted into streets, and if so, with whom rests the jurisdiction and authority to continue, change or abolish them; with the corporate authorities, or with the Court of County Commissioners? Manifestly, what we know as a public road or highway has very little resemblance to a street in a village, town or city. And roads across such rural territory, having no business centre, would be ill-adapted to the wants of a village afterwards established there, itself a business centre. To hold such public roads, thus brought within the boundaries of an incorporated town, to be still under the jurisdiction of the Court of County Commissioners, would be very unnatural, and might lead to conflicts of authority, which should always be avoided. For the Court of County Commissioners to exercise jurisdiction over such highways as a road, and the corporate authorities to exercise jurisdiction over them as a street, would be impossible. They cannot be both a public road of the county, as that phrase is understood, and a street of an incorporated village at one and the same time. One character must yield to the other.

The defendants were indicted for failing and refusing, as officers and supervisors of the public streets of Anniston, an incorporated town, to repair a named street, and for suffering it to remain out of repair for more than ten days at

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one time. If this road or street was not within the governmental control and jurisdiction of the said corporate authorities, then they could not be indicted for permitting it to remain out of repair. When the town was incorporated, and its territorial boundaries established, we think it necessarily followed that the jurisdiction and authority over the highways within those boundaries were transferred to the corporate authorities. Having authority and jurisdiction over the streets of the village, it was clearly within their power to open, alter or even to abolish streets that had ceased to be useful, as, in their judgment, the wants of the village and the public convenience might demand; subject always to the right of eminent domain inherent in the legislative authority of the State. Of course they would be liable to amotion, and possibly to penalties, for a corrupt, causeless, or wanton exercise of this power. The governmental discretion, however, must rest somewhere, and the law confides this, and all other police powers of municipal corporations, to the corporate authorities as the governing body.

We take a further step. A town, created and incorporated as this was, out of rural territory, having, perchance, its public roads adapted to its wants and convenience as a rural community, cannot be bound by any principle of law to adopt and keep up, as a public street, every public road or highway that may have been in use before the change. Nor could a property holder, by dedicating a portion of his soil to the public as a street, compel the corporate authorities, against their consent, to adopt it and keep it up as a street, when the convenience of the public, or the growth and expansion of the town, did not call for such new street.—Dillon on Mun. Corp. §§ 460 *et seq.* 516; Code of 1876, § 1782, Subd. 6; *State v. Mayor*, &c. 5 Port. 279. We think the corporate authorities were authorized to abolish the street, or, to refuse to recognize it as a public street, for not repairing which the appellants were indicted. The charge of the Circuit Court is not reconcilable with these views.

Reversed and remanded—the defendants to remain in custody until discharged by due course of law.

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Indictment for Bigamy.

1. *Challenge of array of jurors; what not ground for.*—It is not ground for challenge to the "array," or of motion to quash the venire for a petit jury, that the officers drew the grand and petit jurors at the same time, and as the names were taken from the box, placed them alternately on the grand and petit juries, according to their respective localities and standing in the county—no unfairness being charged, and jurors having proper qualifications.

2. *Charge, what properly refused.*—When a criminal intent is dependent on knowledge of particular facts, ignorance or mistake as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal liability; and whether or not such belief is honest or feigned, and whether or not there was fault or negligence in not acquiring proper knowledge, are matters for the determination of the jury; and a charge which instructs the jury that a mistaken belief as to facts, constitutes a defense, but withdraws from their determination the honesty of defendant's belief, and the diligence he had exercised to properly inform himself, is properly refused.

3. *Same.*—A charge requested, which requires explanation or qualification, or which has a tendency to mislead and confuse the jury, should be refused.

4. *Bigamy; what intent sufficient to support conviction.*—No other intent is necessary to support a conviction for bigamy, than that which must be inferred from the second marriage, knowing the first wife to be living, or not having a reasonable belief of her death; and a charge which, unexplained, would lead the jury to the conclusion that some other intent was necessary, is properly refused.

APPEAL from Limestone Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellant, Silas Dotson, was tried and convicted of bigamy.

Before the trial in the court below commenced, the appellant "challenged the array of jurors, and moved the court to quash the venire sitting for his trial, on the ground that the judge of probate, clerk of the circuit court, and sheriff of Limestone county, drew the grand and petit jurors at the same time, and as the names of the jurors were taken from the box, placed them alternately on the grand or petit juries according to their respective localities and standing in the community."

It was admitted by the State that the grand and petit juries, of which that sitting for the trial of the appellant was one, were drawn in the manner stated in the above challenge and motion. The court overruled the challenge and motion, and appellant excepted.

The State then introduced a witness who testified that

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the appellant was married to his first wife in Lincoln county, Tennessee, in 1868; that they lived together as man and wife for about five years; that his wife left appellant while they resided in Tennessee and returned to Limestone county, Alabama, to which place he soon came; that soon after her return to Limestone county his wife went to Arkansas, where she remained about six months; that a short while before appellant was married the second time, which was in March, 1879, she stayed in about four miles of where he then lived, but he did not know it. It was proved that about twelve months before the second marriage, the appellant had seen his first wife. The State then introduced one Collier, who testified that a month or two before the defendant married last, that he had a conversation with him; that he did not remember and could not repeat the words or language used by the defendant; that the conversation was about the first wife of defendant, in which they discussed where she lived, he, the witness, expressing the opinion that she lived a few miles off, beyond or below, the town of Athens. This witness further testified that the first wife had lived near the defendant and the witness a while after returning from Arkansas, though he, the witness, did not know of it till afterwards, and that she was now living.

It was admitted that the defendant was married the second time in Limestone county, in March, 1879.

It was also admitted, that if certain witnesses for the defendant were present, they would swear that in August and September, 1878, they told the defendant that his first wife was dead, and talked to him about the fact, and that several of these witnesses have been with the defendant frequently since, and knew of no circumstances or information he has received since, to the contrary.

This was all the evidence in the case, and the defendant requested the following written charges—1st. If the jury believe from the evidence, that at the time the defendant was married the second time, he believed his first wife was dead; then the defendant must be acquitted. 2d. The intent is a material ingredient of the offense. The court refused to give either of said charges, and the defendant separately excepted.

MCCLELLAN & MCCLELLAN, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—It is the duty of the judge of probate, sheriff, and clerk of the circuit or city court, at least twenty

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days before the holding of each regular term of the circuit or city court of the county, or a majority of them, to draw from the box containing the names of the jurors, the names of eighteen persons to serve as grand jurors, and of thirty persons to serve as petit jurors, each week of the term.—Code of 1876, §§ 4738–9. Specific directions as to the manner of drawing the jurors are prescribed, and of these is: “One of them must publicly draw out of the box, in the presence of the others, eighteen names for the grand jury, if the drawing is for a regular term, or for a special term at which a grand jury is required—and the requisite number for petit jurors,” &c.—Code of 1876, § 4740. The challenge to the array, as it is termed in the bill of exceptions, and motion to quash the venire for the petit jury, made by the appellant in the circuit court, is rested upon the ground, that the officers “drew the grand and petit jurors at the same time, and as the names of the jurors were taken from the box placed them alternately on the grand or petit juries, according to their respective localities and standing in the county.” The qualifications of grand and petit jurors are in all respects the same—each must be “a resident house-holder, or freeholder of the county, of the age of twenty-one years,” competent to discharge the duties of grand and petit jurors “with honesty, impartiality, and intelligence, and esteemed in the community for their integrity, fair character, and sound judgment.”—Code of 1876, §§ 4732–33. The statute contemplates that the drawing of grand and petit jurors shall take place at the same time; but in this respect, and in all its provisions prescribing the duties of the judge of probate, clerk, and sheriff, “in relation to the selection, drawing, and summoning of jurors,” it is declared directory.—Code of 1876, § 4759. Whether the grand or petit jury is first drawn, is not material; no person not competent to serve on either jury can be selected, whether the one or the other precedes in point of time in the drawing. And as the qualifications of the jurors are the same, it can not be material that the officers, as the names were drawn, placed them alternately on the one panel or the other. Thereby, a distribution of the grand jury to the different parts of the county, may have been more certainly secured than if the grand jury had been first drawn. The statute does not command that the grand jury shall be first drawn, and it is no ground of objection to the panel of either grand or petit jurors, no unfairness being imputed to the officers drawing, that they drew grand and petit jurors at the same time, or at different times, or pursued the course which was observed in the drawing of the jury challenged by the appellant.—*Bowls v. State*, 51 Ala. 18. When, at com-

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mon law, the petit jurors selected were unexceptionable, it was not matter of objection that others equally unexceptionable were excluded.—*People v. Jewett*, 3 Wend. 314. When petit jurors, free from challenge for cause, are drawn and selected by the proper officers, all the purposes of the law are satisfied.

2. Construed in connection with and in light of the evidence, the charges requested by the appellant were properly refused. The rule of the common law, of very general application, is that there can be no crime, when the criminal mind or intent is wanting. When that is dependent on a knowledge of particular facts, ignorance or mistake, as to these facts, *honest and real*, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility.—*Gordon v. State*, 52 Ala. 308; *Squire v. State*, 46 Ind. 459, (S. C. 2 Green. Cr. Rep. 725). The principle is thus stated by Bishop: "The wrongful intent being of the essence of every crime, the doctrine necessarily follows that, whenever a man is misled without his own fault or carelessness, concerning facts, and, while so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally innocent, the same as he is innocent morally."—1 Bish. Cr. Law, § 303. The belief must be *honest and real*, not *feigned*, and whether it is *honest* or *feigned*, the jury must determine in view of all the evidence. Whether there was fault or carelessness in acquiring knowledge of the facts, is also a matter for their determination. No man can be acquitted of responsibility for a wrongful act, unless he employs "the means at command to inform himself." Not employing such means, though he may be mistaken, he must bear the consequences of his negligence. If he relies on information obtained from others, he should have some just reason to believe that from them he could obtain information on which he may safely rely. It does not appear that the persons informing the appellant of the death of his first wife, had any opportunities of knowing the fact, he did not have, nor on what their knowledge of the fact was based—nor was it shown that he made inquiries of persons who, from their relationship or acquaintance with the wife, would have known whether she was living or dead. Bigamy is a violation of positive law, disturbs the peace of families, offends the good order of society, and involves the legitimacy of children, the descent and succession to estates. A degree of diligence commensurate with the importance of the act—a second marriage, having had a former wife, not so long absent and unheard of, that the law presumed her death, the appellant should have exercised. The charge requested,

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withdrew from the consideration of the jury, the important inquiry, whether the belief of the death of the first wife was reasonable, and of the diligence the appellant had exercised to inform himself of the fact.

The second charge, without explanation, would have misled, or was well calculated to mislead, the jury. It would have induced, or is calculated to have induced, the belief that some other intent than that which must be inferred from the second marriage, knowing the first wife to be living, or not having a reasonable belief of her death, was an ingredient or element of the offense. A charge requested, which requires explanation or qualification, or which has a tendency to mislead or confuse the jury, should always be refused. There is no legal right to such an instruction. The charge in itself, when applied to the facts, is erroneous. A criminal intent is generally an element of crime, but "whatever one voluntarily does, he of course intends to do," and whenever an act is criminal under particular circumstances, the party doing the act is chargeable with the criminal intent.—*Com. v. Mash*, 7 Metc. 472; *Reynolds v. U. S.* 98 U. S. The appellant knew he had been once married—that the marriage had never been dissolved—that his wife had not been so long absent a presumption of her death could be indulged, and by the slightest diligence could have ascertained she was living within a few miles of him. A second marriage was a violation of the law, and he must be presumed to have intended the violation. We are satisfied no error was committed by the Circuit Court, and the judgment is affirmed.

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Bill in Equity to enforce Vendor's Lien.

1. *Administration of decedent's estate; what court has jurisdiction over.*—Under the general statutes, only the probate court of the county in which the decedent had his last residence, has jurisdiction to grant an administration of his estate, no matter in what part of the State his property may be; but this results from statute and may be changed by statute applicable to a particular estate.

2. *Objection to bill; where must be first made.*—The objection can not be urged here for the first time, that a bill is too general in its allegation of facts requisite to authorize the removal of an administration, pursuant to an act of the legislature, when the defects in that respect could have been remedied by amendment, in the court below, if a demurrer had been there interposed, specially setting forth the ground of objection.

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3. *Evidence; where objections to, must be primarily made.*—Objections can not be raised here to evidence, on the ground that it was secondary, without proper predicate for its admission, when no objection was raised on that ground in the court below.

4. *Vendor's lien; what will not defeat.*—The legal title to land sold by the vendor, who took notes and gave bond to convey title upon full payment, passes on his death to his heirs, but they hold it only in trust for the vendee, if he has paid the purchase money, or if not, that the vendor's lien may be made available against it; and they can not convey it to any one having actual or constructive notice of the executory agreement of sale, so as to cut off the vendee's equity or that of the vendor's administrator to a specific performance; and the notes for the purchase-money pass to the personal representative, and not to the heirs, who holds them in trust primarily for creditors, and next for the distributees of the estate. In equity such a transaction is an equitable conversion of the land into personal property, and intercepts the descent to the heir.

5. *Estoppel; what acts of former administrator do not estop succeeding ones.*—An administrator, by his acts or agreements with sub-purchasers from the original vendee, may estop himself from asserting a vendor's lien on the lands in their hands; but this estoppel will not bind a succeeding administrator, who may, if the purchase money is necessary for the payment of debts, enforce the lien for the benefit of the estate.

6. *Bona fide purchaser; who is not.*—A vendee, who neither avers nor proves that he has paid the purchase-money in full or in part, is not entitled to protection as a *bona fide* purchaser.

APPEAL from Lawrence Chancery Court.

Heard before Hon. WILLIAM SKINNER.

The opinion states the case.

WATTS & SONS, THOMAS M. PETERS, and H. C. SPEAKE, for appellants.—The legislature has the undoubted right to transfer the administration of an estate from the county of the decedent's residence.—*Tindal v. Drake*, 60 Ala. 170, and authorities cited. If the bill is defective in averment, such defect should have been pointed out by demurrer in the court below, specifying the precise ground of objection. The defect here insisted on, as to the failure to aver that the consent of the sureties was filed in each of the probate courts of Winston and Lawrence counties, could have been remedied by amendment, and not being raised on demurrer in the lower court, furnishes no ground of reversal here.—10 Ala. 305. It was shown that the records of each of these counties had been destroyed by fire, and, beside, no objection was made to the testimony in the court below, and they can not be first raised in this court.—1 Brick. 848. The land of Thomas Greene descended to his heirs, but they held as trustees for the creditors until the debts were paid, and the administrator of his estate had a paramount right to the heirs for the purpose of paying the debts.—*Patton v. Crow*, 26 Ala. 426. The heirs could make no contract which could defeat this paramount right, and purchasers from them can have no better right than they had, and the lands in their

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hands is subject to the payment of the debts of Thomas Greene. Thaxton never had any legal title, and Burdett & Motheral did not acquire any title by their transactions with him. Their answer shows that they were fully informed as to all the facts, and none of the sub-purchasers are shown to be *bona fide* purchasers without notice and for value. As to these lands, the whole case may be thus summed up: Thomas Greene owned the lands, and owed debts whose payment the law charged on the land. He died with the legal title in him, and the debts unpaid. The lands descended to his heirs subject to the payment of these debts, and no purchaser with notice from the heirs can resist the representative of the estate when he seeks to subject them to the payment of his intestate's debts. The administrator *de bonis non* is not bound by any agreement of the administrator in chief, and no act of the latter can affect the rights or duties of the former.

R. O. PICKETT and WILLIAM COOPER, *contra*.—The bill fails to aver the prerequisites of a valid transfer under the act of February 8, 1861. It charges, by way of recital only, that George S. Greene complied by giving bond to administer the estate in Lawrence county, and it utterly fails to aver that the sureties of the administrator in chief ever assented to any such transfer, and their assent was to be filed in writing in the probate court of each county before the jurisdiction of the probate court of Lawrence county ever attached, and if this was not done, the action of that court is *coram non judice* and void, and the appointment of the complainant as administrator *de bonis non* is a nullity.—See 40 Ala. 155, and cases cited. When the original notes of Thaxton was given up by Greene, the administrator, the vendor's lien was gone. The notes were paid by the notes then given to Thaxton, and Burdett & Motheral obtained a title by the conveyance of the heirs and administrator, which was discharged of the vendor's lien. The right to enforce the lien then resided in George Greene, and upon his surrender of the notes for the purchase-money, it was gone forever.—10 Pick. 215; 2 Cow. 807; 9 John. 244; 5 Yerger, 109; 11 Mass. 259; 12 Mass. 210.

STONE, J.—Under the general statute, when a resident of this State dies, no matter in what part of the State his property may be, only the court of probate of the county in which he had his last residence has jurisdiction to grant administration of his estate.—Code of 1876, § 2349. This, however, is the result of statute, and may be changed by

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statute, either general in its provisions or made applicable to particular estates.—*Tindal v. Drake*, 60 Ala. 170, and authorities cited. Thomas Greene died intestate, a resident of Winston county, and the court of probate of that county appointed George T. Greene, son of intestate, administrator of his estate, who gave bond and qualified as such in that court. Soon afterwards—in about two months—the act of the legislature was approved, by which it was declared, “That from and after the passage of this act, the administration of the estate of Thomas Greene, deceased, be, and the same is hereby removed from Winston to Lawrence county in this State. That the court of probate for the said county shall take jurisdiction of the said administration, and that the administrator of said estate shall be required to give bond, and account and make settlement with the said court of probate, as required by law in other cases: *Provided*, that the sureties of the said administrator shall first file their assent in writing to the provisions of this act, in the probate court of Winston and Lawrence county.”—Pamph. Acts, called session, January 1861, p. 74. The complainant in the present suit—administrator *de bonis non* of Thomas Greene, deceased—was appointed such administrator by the judge of probate of Lawrence county. It is contended for appellees, that the decree of the Chancellor, dismissing complainant’s bill, should be affirmed, because the bill fails to show the judge of probate of Lawrence county had jurisdiction to appoint an administrator on said estate. The record contains no evidence that this question was presented or considered in the court below. The precise objection is, that the bill fails to aver that the sureties of the administrator filed, in the probate courts of Winston and Lawrence counties, their assent in writing to the provisions of the act copied above. We do not think the bill is obnoxious to the criticism, that the portion we are considering is mere recital, and not an averment that its statements are true. We think it complies fully with the statute in that regard.—Code of 1876, § 3761. The language of the bill is, “Complainant further sheweth, that afterwards, viz: on or about the 8th day of February, 1861, said administration of said estate was removed by act of the General Assembly of the State of Alabama from said county of Winston to the county of Lawrence in this State; said act is entitled,” &c., “and was approved the 8th day of February, 1861, and will be found in pamphlet acts of called session 1861, at page 74—No. 90—to which this court is respectfully referred, and which complainant asks to be allowed to produce on the hearing of the bill, if necessary. And complainant further sheweth, that said

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George T. Greene, as administrator as aforesaid, upon the removal of said administration of said estate to said county of Lawrence, as allowed by said law, complied strictly with all the provisions and requirements thereof, and undertook the administration of said estate in said county of Lawrence," &c. The objection urged to this averment is, that it does not, in terms, state that the sureties of the administrator filed their assent in writing to the provisions of said act, in the probate courts of Winston and Lawrence counties. All the defendants answered the bill in this cause, and none of them assigned this objection, as ground of demurrer to the bill. If this question had been raised by demurrer, and the demurrer had been sustained, the complainant would have had to amend his bill, and could have made the averment more specific. Our statute (Code of 1876, § 3784,) requires a demurrer to a bill to set forth the ground of demurrer specially, and declares that otherwise it must not be heard. The objection we are considering is not that the bill omits this important averment—important to give the probate court of Lawrence jurisdiction of the administration—but that the averment is, in form, too general. This, we hold, could only be reached by demurrer, specifying the ground; and if well taken, an amendment, curing the imperfection, would have been allowed.—*Wellborn v. Tiller*, 10 Ala. 305. The objection to this averment, if, indeed, the averment is defective, being amendable in the court below, furnishes no ground for affirming the decree of the chancellor, if the complainant is otherwise entitled to relief.

A second reason urged why the decree of the chancellor should be affirmed is, that inasmuch as the assent of the sureties of the administrator to the removal of the administration from Winston to Lawrence county was required to be in writing, and filed in each of the probate courts of Winston and Lawrence, the record contains nothing which we can consider evidence of this material fact. The oral testimony of witnesses, un rebutted as it is, is sufficient to raise the presumption that such written assent was filed in said courts; but the objection is, that this is a record fact, which can be proved only by the record; and if the record has been lost or destroyed, then the record should have been first re-established according to the statute, and a certified copy of such re-established record produced in evidence. We think the proof in this record establishes the fact that the records of both Winston and Lawrence counties were destroyed between the time of the removal of the administration and the taking of the testimony in this cause. There was no objection, however, in the court below, to this or any other

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part of the testimony offered. This was a waiver of all objection to its legality.—1 Brick. Dig. 848, § 635. But we are not prepared to admit the testimony was illegal.—1 Greenl. Ev. § 509.

Under our statutes, lands as well as personal property of a decedent are charged with the payment of the debts of the estate. And when a sale of lands becomes necessary for the payment of debts, the assertion, by the personal representative, of his right to bring the lands of his testator or intestate into administration, intercepts the descent to the heir; and, to this end, the personal representative may maintain ejectment for the recovery of possession of lands owned by decedent at the time of his death, even against the heir himself. The legal title, it is true, is cast on the heir; but in such case, he holds it only in trust for the benefit of creditors, whose claims are paramount. The executor or administrator, that he may hold the lands in readiness to meet debts, either by leasing or selling the same, should it become necessary, has a right to the possession, which will prevail over the legal title descended to the heir; and hence he may maintain ejectment against the heir, or any intruder into the possession.—1 Brick. Dig. 625, § 6; *McCullough v. Wise*, 57 Ala. 623. Of course, we do not gainsay the widow's quarantine rights. Such is the law, where decedent dies the owner of lands, and has made no agreement for the sale thereof.

In the present case, Greene, the intestate, made an executory agreement, in his life time, with Thaxton, by which he agreed to sell the lands in controversy at the agreed price of eight thousand dollars. Thaxton gave his notes for the purchase money, and Greene executed to him a bond to make him title, and put him in possession. When Greene died, no part of the purchase money had been paid, and no title had been made to Thaxton. Thus the title remained, with only seven hundred dollars of the purchase money paid, when Burdett and Motheral commenced negotiations with Thaxton for the purchase of the lands. The record informs us that they, Burdett and Motheral, had full knowledge of the condition of the title. In fact, they do not, in their answers, deny such knowledge, but impliedly admit it. They state in their answers, "that when the said Thomas Greene sold the said tract of land to said Thaxton, he made him no deed, but executed a bond for titles, of which these defendants were informed by said Thaxton, before they purchased said lands from him. But they do not know that the said Thomas Greene, at the time of his sale of said lands to said Thaxton, retained his vendor's lien on said land for the payment of the purchase money, other than the fact that Thaxton had

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no deed from Greene, but only his bond for title; of this, as before stated, they had notice." The title bond showed that the purchase was on credit, and bound Greene to make title only when the purchase money was paid. In bar of plaintiff's right of recovery, these defendants set up the following averred facts: "That before they purchased said tract of land from said Thaxton as aforesaid, he, said Thaxton, agreed and stipulated with these defendants, that all liens, incumbrances and defects of titles on and to said tract of land should be removed, if any existed; and that in pursuance of this agreement, * * said Thaxton complied with his agreement, and did remove all liens and incumbrances on said lands, and especially the lien of Thomas Greene, deceased, which the administrator now seeks to enforce by this suit as the vendor's lien for the purchase money of said lands." After averring that Thaxton made partial payments to the administrator, which were entered as credits on the unpaid purchase money, the answer proceeds: "For the balance of the purchase money due on said lands, the said George Greene, administrator as aforesaid," (the administrator in chief of Thomas Greene's estate,) "received of the said Thaxton his notes, with the full understanding and agreement that this arrangement was to waive and abandon all liens on said lands for the purchase money; and then and there the said George Greene, administrator, delivered up to the said Thaxton his original notes for the purchase money of said lands, and the same were canceled and effaced. And these defendants charge and allege that they would not have purchased, and did not purchase said lands, until the vendor's lien for the purchase money was removed and waived as above set forth, and the same was sanctioned by the said George Greene as the administrator of the estate of Thomas Greene, deceased,—who afterwards, to-wit: on the 12th day of October, 1863, executed a deed in due form conveying to them, in consideration of the sum of eighteen thousand five hundred dollars, the said tract of land, together with the widow of said Thomas Greene, deceased, and his other heirs at law, save one." The deed is made an exhibit, and contains the names of the widow, and all the heirs save one, a married woman. Another heir executing the deed, Mrs. Flanagan, signs her name alone, without the concurring signature of her husband. Taking these averments to be true in all they import, we think they amount to an admission of the following state of facts, and of Burdett and Motheral's knowledge that such were the facts, namely: That Thomas Greene, in his life time, made an executory agreement with Thaxton to sell him the lands in controversy, and to make him title

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when the purchase money was paid; that when Thomas Greene died no part of the purchase money had been paid, and no title made; that when Thaxton made the arrangement with the administrator, widow and four of the five heirs, by which he obtained their deed of conveyance to Burdett and Motheral, he did not pay the purchase money, but took up the unpaid purchase money notes, by giving others in their stead. We repeat, the answer does not allow us to doubt that Burdett and Motheral knew these several matters before they concluded their purchase from Thaxton. These are the averred grounds on which these defendants claim that there is no vendor's lien in this case, as against them. The defendants, in the court below, offered no testimony, except their sworn answers and their deed referred to above. The main features of this defense rest on affirmative averments, not responsive to any allegations in the bill. None of it is proved, except the making of the deed by the widow and part of the heirs; and as to those who signed the deed, there is proof tending to show that some of them, at least, affixed their names to it without knowing its contents. But we do not rest our opinion on this ground.

Before the death of Thomas Greene, as we have shown, he had contracted to sell the lands to Thaxton, received his notes for the purchase money, given him a bond to make him title, and put him in possession. This did not change the legal title to the land, but left it in Thomas Greene; and when he died, the title descended to his heirs. It was, however, an equitable conversion of the land into personal property; and, in equity, the descent of the land to the heir was intercepted thereby. Speaking of such contracts, and the rights growing out of them, Story, in his work on equity jurisprudence, vol. 1, § 790, says: "In the view of courts of law, contracts respecting lands, or other things of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But courts of equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir as land. The vendor is deemed in equity to stand seized of it for the benefit of the purchaser; and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming

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under him as a purchaser, with notice of the trust. The heir of the purchaser may come into equity and insist upon a specific performance of the contract; and, unless some other circumstance affect the case, he may require the purchase money to be paid out of the personal estate of the purchaser, in the hands of his personal representative. On the other hand, the vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid; for the remedy, in cases of specific performance, is mutual, and the purchase money is treated as the personal estate of the vendor, and goes as such to his personal representatives. In like manner, land, article or devised to be sold and turned into money, is reputed as money." This principle, which is unquestionably correct, precisely meets the wants of complainant's case. The notes given by Thaxton to secure the purchase money, were personal assets, and passed to the personal representative, not to the heirs. The legal title to the land descended to the heirs, but they held it only in trust for Thaxton, the purchaser, if he paid the purchase money; and if he did not, then in trust that the vendor's lien might be made available against it. They could not convey it to any one having actual or constructive notice of the executory agreement of sale, and thus cut off either Thaxton's or the administrator's equity for a specific performance.—2 Brick. Dig. 519, § 181.

It is claimed for appellees, that inasmuch as the administrator himself surrendered the purchase money notes, and united in the deed of conveyance, this divested the right of the estate to pursue the lands in the hands of the vendees from Thaxton. The administrator, however, held the notes in trust, for the creditors of the estate primarily, and next for the distributees of the estate. He may have estopped himself from afterwards enforcing the payment of the surrendered notes, by the conveyance he made.—*Hopper v. Steele*, 18 Ala. 828, and authorities cited. The estate, however, owed large debts, and, without this claim, has not assets for their payment. The administrator *de bonis non* is not affected by this estoppel, but may enforce the lien for the benefit of the estate.

Pullen, the sub-purchaser from Burdett and Motheral, does not show himself a *bona fide* purchaser. He neither proves nor avers that he has paid the purchase money, or any part thereof.—2 Brick. Dig. 518, §§ 171-2.

The decree of the Chancellor is reversed, and this court, proceeding to render the decree the Chancellor should have rendered, doth order and decree that the complainant is entitled to the relief he seeks. It is referred to the register to

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take and state an account of the amount due and unpaid of the purchase money, including interest; and he will report to the Chancery Court. All other questions are left open for decision and decree by the Chancery Court.

Reversed and rendered.

BRICKELL, C. J., not sitting.

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Indictment for Arson.

1. *Evidence; what admissible.*—Any indications of a consciousness of guilt, by a person suspected of or charged with crime, or who may after such indications be suspected or charged, are admissible evidence against him; and the number of such indications can not be limited, or their character or nature be defined.

2. *Same.*—When it is clear that the particular conduct or declarations have no relation to the offense, and ought not to have any weight with the jury, the court should reject them as evidence; but however minute or insignificant they may be, if they tend to elucidate the transaction, they must be admitted.

3. *Same.*—Where a conversation with the prisoner is offered against him, he has the right to have all that was said at the time, on the same subject, laid before the jury; but a conversation can not be excluded, because the witness with whom it has had, detailing all of the conversation he heard, states that if the prisoner made any reply to the last remark of witness, in the conversation, he did not hear it; especially so, where there were other witnesses present, by whom the prisoner could prove his reply, if material.

4. *Same.*—On the prisoner's trial for arson of A's gin-house, the State may show by a witness who went to a group of persons, among whom was the prisoner, to request them to desist from loud talking, which disturbed services at a church, that defendant, when he saw witness, said he supposed witness had been to another county to find out who burned A's gin-house, to which the witness answered "it is a lie;" and, also, that witness made another remark, about what he heard the prisoner had said about burning the gin-house, though the witness stated he did not hear the defendant's reply, if he made any.

5. *Charge; what erroneous.*—Where the conduct, demeanor, or expressions of the prisoner are relied on as indications of conscious guilt, and their weight and importance depends wholly on their combination with other inculpatory facts, the court should carefully instruct the jury as to the caution with which they should be received, and that it is from their connection with other facts that their whole value should be determined; and it is error to single out one such fact, separating it from the combination of facts, which alone gives it force as criminating evidence, and instruct the jury that they may look to it alone, as tending to show the prisoner's guilt.

6. *Evidence; what admissible.*—In proof of motive to commit the crime, it may be shown that a person other than the owner of the gin-house which the prisoner was charged with burning, had property therein, and that the prisoner had malice towards him.

7. *Confessions; rule as to admission of.*—Where a confession has been obtained by improper influences, subsequent confessions, while such influence

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continues, are inadmissible; but there is no rule that because one person applies such influences and they are unavailing, subsequent confessions made to other persons will be presumed to have been induced by them.

8. *Error; what compels a reversal.*—However reluctant an appellate court may be to interfere with the discretion of the primary court in regulating the trial of cases, yet if it should appear that it had refused, to the prejudice of a party, to confine counsel to the law and evidence of the case—if it has permitted them to refer to and comment upon facts not in evidence, or which were not admissible as evidence—a reversal will follow.

9. *Charge; what error to refuse.*—When the circumstances of the case are such that the prisoner's failure to aid in the saving of a gin-house, with the arson of which he is charged, makes against him, and the State has proved a conversation between the prisoner and the prosecutor, in which the former stated his sickness prevented his going, it is error to refuse a written charge instructing the jury that "when the State called for the conversation between the prisoner and the prosecutor, defendant was entitled to have the whole conversation go to the jury; and what the prisoner said about being sick, is evidence for him, and if the evidence is believed, it may be considered as sufficient excuse for defendant's failure to go to the gin-house while burning, and the jury should not consider that as a circumstance against him."

10. *Same.*—It is error to refuse a written charge, in a criminal case, which asserts that it is the duty of the prosecutor to prove every material fact charged in the indictment, to a moral certainty, and to satisfy the minds of the jury of the defendant's guilt beyond all reasonable doubt, and if they have failed to do this, and the jury can account for defendant's innocence upon any reasonable hypothesis, in view of all the evidence—then they should find him not guilty.

APPEAL from Coosa Circuit Court.

Tried before Hon. JOHN HENDERSON.

The appellant, Claiborn McAdory, was convicted of the burning of a gin-house of one Patrick J. McAdory, of the value of four hundred dollars. P. J. McAdory, as a witness for the State, testified that his gin-house, situated in Coosa county, Alabama, and worth, with the contents, more than five hundred dollars, had been burned up on the night of the 17th of December, 1876; that he went immediately to the fire on being aroused, and that he found there several persons; that a short time afterwards James McAdory and Wiley Corbin came to the place where the gin-house was on fire; that the defendant did not come; that on the morning of the next day, he was standing at his gate and saw defendant coming down the public road, which ran about fifty or one hundred yards from his house; that the defendant was not coming by his house, but was going down the road, which was nothing unusual, as he frequently passed without stopping; that, seeing defendant, he called to him and told him to come by, which he did. Witness then said to him, "that he thought he was a friend to him," and defendant replied that he was. Witness then said, "why did you not come and help me last night," to which defendant replied "that he started, and got to a certain place, and was sick, and went back." Witness then told defendant that "he believed he

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was the party who burned his gin-house," to which defendant replied "that he was not."

The State then introduced one Slaughter, who testified that he was steward of the church; that one night, while at church, he was requested by the preacher to go out and request some parties who were talking and laughing about fifty yards from the church, to stop their disturbance; that when he got to the point he found it was defendant in conversation with other persons, naming them; that defendant said to witness, "I suppose you have been over in Tallapoosa county trying to find out who burned McAdory's gin-house," to which witness remarked "it was a lie." Witness then stated, in the presence of defendant, "that he heard that defendant said, that if it had not been for Jack Matthews' big mouth the gin-house would have been standing;" that witness did not hear defendant's reply.

To this evidence the defendant objected, the court overruled the objection, and he excepted.

One Beasley, a witness for the State, after testifying to the conversation of P. J. McAdory and defendant, substantially as McAdory had testified, was asked by the State if any one besides McAdory had cotton in the gin-house at the time of the burning? To this evidence the defendant objected, the court overruled the objection, and he excepted. The witness then testified that one Jack Matthews had cotton in said gin-house at that time.

One Norwood testified that he had known defendant for a long time, but was not related to him, but that his wife was. This witness was then asked, if he had ever had any conversation with defendant about the burning of McAdory's gin-house, and stated that on one occasion he had a conversation about the matter enquired of, while returning from church. Witness was then asked, if any inducements were held out to the defendant to confess, or if he offered any reward or threatened him with any punishment, and replied that he offered no inducements and made no threats. The witness could not fix the exact time at which this conversation took place.

Defendant here offered to show that inducements had been held out to defendant to confess, and for that purpose introduced P. J. McAdory, who stated "that some time after the burning he had a conversation with defendant, in which he asked him to tell him about the matter, and afterwards he told him that he was a young man, and if he would come out like a man and tell all about it, it would go much lighter with him, or be better for him." Witness could not fix the exact time of this conversation, but it was shortly after the burning occurred.

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The State then recalled Norwood, and asked what the defendant said in the conversation referred to. Defendant objected to evidence of any thing then said by him. The court overruled the objection, and he excepted. Witness then stated "that while he and defendant were coming from a funeral, he asked defendant if he knew who burned McAdory's gin-house; that defendant asked him if he would keep it a secret if he would tell him," and upon witness saying that he would, defendant "told him that Jack Matthews cursed him, and told him (defendant) that he could buy him; that he wanted to get even with him, and that he stuck a match to the pick-room."

In the closing argument of counsel for the State, a reference was made to the fact that defendant had witnesses present, (of which there was no evidence,) who were not examined, and it was insisted that the failure to examine these witnesses was a circumstance against him.

This was substantially all the evidence, and the court charged the jury, among other things—1. If the evidence satisfies you that the defendant had a motive to burn the gin-house of Patrick J. McAdory to injure Jack Matthews, believing that Jack Matthews had cotton in the gin-house, you can look to that fact as evidence tending to show his guilt. To this charge the defendant duly excepted.

The court also charged the jury as follows: "If the jury are satisfied from the evidence that a conversation was had between the witness Slaughter and the defendant at the time testified about by the witness Slaughter, in substance, to the effect that the defendant charged Slaughter with going to Tallapoosa county to enquire about the burning of McAdory's gin-house, and the witness denied having done so, and stated that he (the witness) had heard that the defendant had said if it had not been for Jack Matthews' damned mouth, McAdory's gin-house would have been standing—the jury may look to this fact, as evidence tending to show the guilt of defendant. To the giving of this charge the defendant excepted.

The court further charged the jury, "If the evidence satisfies you that the defendant had a motive to burn the gin-house of P. J. McAdory to injure Jack Matthews, believing that Jack Matthews had cotton in the gin-house, you can look to that fact as evidence tending to show his guilt." To this charge the defendant also excepted.

The appellant then requested the following written charges: 1. That the manner in which defendant's counsel have managed his case, in not putting other witnesses on the stand, is not a fact to be considered against the defendant. 2. The

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fact that defendant failed to introduce certain evidence, is not a fact to be considered against him, as he has a right to rest his case upon the State's evidence, if he thinks it fails to make out a case against him. 3. When the State called for the conversation between McAdory and defendant, the defendant was entitled to have the whole conversation go to the jury, and what he said about being sick is evidence for him, and if the evidence is believed it may be considered as a sufficient excuse for defendant's failure to go to the gin-house while burning, and that the jury should not consider that as a circumstance against him. 5. It is the duty of the State to prove every material fact charged in the indictment to a moral certainty, and to satisfy the mind of the jury of the defendant's guilt beyond all reasonable doubt, and if they have failed to do this, and the jury can account for the defendant's innocence upon any reasonable hypothesis, in view of all the evidence, then they should find him not guilty." These charges were refused, and defendant excepted.

There was a verdict of guilty, and judgment and sentence accordingly, and the defendant brings the case here by appeal.

STEPHEN J. DARBY, for appellant.—The evidence of Stewart was inadmissible. The rule is that where a party is charged with an offense in his presence and he fails to reply, the presumption of acquiescence arises.—See 1 Greenleaf Ev. § 199. The charge must be one which naturally calls for a reply. It may be impertinent, and best rebuked with silence.—See, also, *Fuller v. State*, 30 Ala. 654; *Lawson v. State*, 20 Ala.; *Campbell v. State*, 55 Ala.; *Bob v. State*, 36 Ala. 565. The evidence as to Matthews' having cotton in the gin-house, was also improperly admitted. It was *prima facie* irrelevant, and should have been excluded, unless offered in connection with other evidence which would render it admissible.—See 1 Greenl. Ev. §§ 50, 52. The alleged confessions were also improperly admitted. The defendant had shown that the prosecutor had offered inducements to him to confess. The time of the confession and of the inducements offered could not be definitely fixed by the witnesses.—See on this point, *Bob v. State*, 32 Ala. 560; 1 Greenl. Ev. § 320, note 1. The charges of the court as to the conversation with Stewart, and the motive that defendant might have to burn the gin-house, are erroneous. They single out small portions of the evidence and give them undue weight.—*Campbell v. State*, 55 Ala. The first and second charges asked by the defendant, should have been given. Counsel for the State, in the closing argument to the jury, had stated that defendant had

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witnesses, and his failure to introduce them was a circumstance against him, and the defendant had no other way to combat the argument. The charge numbered three, should have been given. The State had called for the conversation between McAdory and the defendant, and he was entitled to have all that was then said go before the jury.—See *Corbatt v. State*, 31 Ala. 330.

H. C. TOMPKINS, Attorney-General, *contra*.—The conversation with Stewart was clearly admissible. Why should defendant have asked a question about the witness having gone to Tallapoosa county to find out who burnt the gin, unless he had an interest in the matter? It was a circumstance tending to connect him with the commission of the offense, and no matter how slight the tendency, its relevancy was not thereby affected. It also tended to show motive in the defendant to commit the offense. The testimony that Matthews had cotton in the gin-house, was also properly admitted. The motive of the defendant for burning the gin-house was to injure Matthews, and it was certainly relevant to prove that Matthews was injured. It was shown that the witness by whom it was proposed to prove the confessions of defendant, that no inducements or threats had been made, and inducements held out by other parties, not in the presence of the persons to whom the confessions were made, could not render them inadmissible.—*Levison v. State*, 54 Ala. 520. The charge of the court was free from error. The first and second charges asked by the defendant were abstract; there was no evidence to support them.—1 Starkie Ev. 33.

BRICKELL, C. J.—The conversation between the prisoner and the witness Slaughter, had reference to the burning of the gin-house, and it was the prisoner who directed it to that subject. Any indications of a consciousness of guilt by a person suspected of or charged with crime, or who may after such indications be suspected or charged, are admissible evidence against him. The number of such indications it is impossible to limit, nor can their nature or character be defined. Presumptions or inferences may be, and often are, founded on circumstances which, of themselves, independent of the accusation, would not be ground of crimination. It is largely a question of fact, rather than a question of law, for the determination of the jury, whether particular conduct, or particular expressions of the accused, refer to a criminal offense, and spring from his consciousness of guilt. When it is clear that they have no relation to the offense, and that they ought not to have any influence with the jury, it is the duty of the

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court to reject them as evidence. But however minute or insignificant they may be, shedding but a dim light upon the transaction, if they have a tendency to elucidate it they must be admitted. They may be connected with other circumstances which will constitute a chain of evidence, leading the mind to a satisfactory conclusion.—*Johnson v. State*, 17 Ala. 624; *Campbell v. State*, 23 Ala. 45; *Liles v. State*, 30 Ala. 24. Standing alone, it may be the conversation between the prisoner and Slaughter would be insignificant, and entitled to no weight in determining the guilt of the accused; but it may become important, and may lead to the conclusion of guilt, if it is shown that he had a motive and opportunity to commit the crime, and that there are other inculpatory facts. The prisoner had, however, as his counsel argues, the right to evidence of all that was said by him in the course of the conversation. The rule applies, that when the declarations of a party are offered in evidence against him, he has the right to lay before the jury all that he said at the time, in relation to the same subject. Otherwise, it would be impossible to ascertain their real import, and injustice might be done, by the suppression or withholding of parts of the conversation, which would qualify or explain those proved. It is the exclusion of fragments of a conversation, or of declarations, the rule requires. Here the witness stated all the conversation he heard and that he did not hear, supposing it had reference to the same subject, he could not repeat. The rule, we think, was satisfied. If a reply was made by the prisoner to the last remark of the witness, there were persons present, having opportunities of hearing it, by whom he could have proved it, if material.—*Covington v. State*, 2 Bailey, 569; *Bob v. State*, 32 Ala. 560.

Verbal admissions in a civil cause, and mere oral confessions in a criminal cause, are received with great caution. There are many infirmative considerations attending them, to which the minds of the jury should be drawn in weighing them. They are easy of fabrication, and the detection and exposure of their falsity is often difficult. Where there is no reason to suspect fabrication, much depends on the circumstances surrounding the party, the capacity of the witness, the degree of attention given by him when they were made, the clearness of his understanding of them, and the accuracy of his memory. When, as observed by Prof. Greenleaf, they are deliberately made and precisely identified, they are often evidence of the most satisfactory nature. When not a direct confession of a prisoner, but his conduct, demeanor, or expressions, are to be used as indications of

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conscious guilt—when their importance and weight depends wholly on their combination with other inculpatory facts, the court should carefully instruct the jury as to the caution with which they should be received, and that it is their connection with other facts to which they owe whatever of value should be attached. Terror, or alarm, when charged with or arrested for a crime, or manifested when the crime is mentioned, is a fact which may be proved, as may be flight, or the concealment of evidence. But if either of these facts stood alone, disassociated from any and all other criminating evidence, the court could not, as matter of law, announce to the jury that it was a fact having a tendency to prove the guilt of the accused. Of that tendency it is deprived, and it sinks into insignificance, when there are no other criminating facts. The conversation with Slaughter, if there was a want of other criminating facts, stands upon the same ground—whatever of value may be justly attached to it, is derived from its combination with the other facts. The court was in error, in singling it out, separating it from the other facts, and announcing to the jury that they could look to it alone as tending to show the guilt of the prisoner. The fact would not be shorn of its just strength, if the court had instructed the jury as to all the infirmative considerations attending it, the caution with which it shall be received, and that its value depended on their being satisfied of its truth, and the truth of the other inculpatory facts.

It is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense. It may spring from the lust of gain, or the gratification of an unlawful passion.—Burrill on Cir. Ev. 285. Now the confession of the prisoner, independent of any inference which may be drawn from the evidence of Slaughter, indicates that he was moved to commit the offense because of his hostility to Matthews. It was then permissible to show that Matthews had cotton in the gin-house. The destruction of the cotton, inflicting loss on Matthews, may have ministered to the gratification of the prisoner's revengeful feelings towards him. There was no error in the admission of the evidence. The instruction to the jury in reference to it, is subject to the objections stated to the preceding charge.

Confessions of guilt can not be received as evidence, unless they appear to have been voluntary. Whether they are voluntary, it is the duty of the court to determine, after a careful consideration of the age, situation and character of the accused, and the circumstances under which they are made. When all these are considered, if it satisfactorily appears

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that they spring from the volition of the accused, and there is an absence of evidence that any person had exerted an influence to induce them, it is not necessary, the witness proving them should be inquired of, whether he or any other person had told the prisoner it would be better for him to confess, or worse if he did not.—1 Green. Ev. § 219; *Levison v. State*, 54 Ala. 520. The confession of itself, taken in connection with the circumstances under which it was made, may bear the best evidence of its freedom from all improper appliances to the mind of the prisoner. The usual preliminary questions were in this instance propounded to the witness, and answered negatively; and when all the circumstances are considered, it is impossible to doubt that the confession was voluntary. Nor was its admissibility affected, because if a confession had been made to McAdory, when he exhorted the prisoner to confess, it would have been inadmissible. The rule is, that when a confession has been obtained by improper influences, subsequent confessions, while such influences continue, are inadmissible. It is not, that when one person applies such influences, and they are unavailing, confessions made subsequently to other persons, will be presumed to have been induced by them.—*Levison v. State*, *supra*.

“The presumption,” says Mr. Starkie, “that a man will do that which tends to his obvious advantage, if he possesses the means, supplies a most important test for judging of the comparative weight of evidence. It is to be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted.”—1 Stark. Ev. 846. Hence, when in a civil case, the party against whom a claim is preferred, has evidence which would repel that offered to support the claim if it is unfounded, his failure to produce it creates a presumption against him, and in favor of his adversary. And when a prisoner declines to produce evidence within his reach which would explain or contradict the criminating evidence against him, it is a fact of importance, and may “give a conclusive character to circumstances which would otherwise be of an imperfect and inconclusive nature.” We are not prepared to say, that the facts of this case, rendered an argument by the counsel for the State, that a presumption unfavorable to the prisoner could be drawn from his failure to produce evidence in explanation or contradiction of the evidence against him, impertinent or irrelevant. The circuit court seems to have considered such argument legitimate, and we would not be inclined to disturb its rulings on a matter of this kind, unless they were shown clearly to be erroneous.

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We remark, however, that counsel should not be permitted to comment upon facts not proved before the jury as true, and not legally competent and admissible as evidence. However reluctant an appellate court may be to interfere with the discretion of a primary court in regulating the trial of causes, if it should appear that it had refused, to the prejudice of a party, to compel counsel to confine their arguments and comments to the jury, to the law and evidence of the case under consideration—if it had permitted them to refer to and comment upon facts not in evidence, or which would not be admissible as evidence, it would be a fatal error.—*Tucker v. Henniker*, 41 N. H. 317; *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Ib. 628.

The third charge requested by the prisoner, is rather involved. We construe it, however, as asserting the general principle, that when the declarations of a party are offered in evidence, the whole must be taken together, as well that which is favorable as that which may be regarded as injurious. The jury are not bound, and the charge does not instruct them that they are bound to give credence to each and every part of the declaration. They may, for satisfactory reasons, reject a part and credit another. Still, it is right that the whole declaration shall be laid before them, and while they can not arbitrarily or capriciously receive or reject any part, after a deliberate consideration of all the circumstances under which it was made, of the motive of the party, of its consistency with any other evidence in the cause, they must determine how far it is entitled to credit.—*Corbett v. State*, 31 Ala. 329; *Levy v. State*, 49 Ala. 390. The charge asserts further, if the jury believed the declaration of the prisoner, that he was sick, and not able to reach the gin-house while burning, any unfavorable inference which could be drawn against him because of his absence would be removed. If this is the proper construction of the charge, its correctness follows from the decision, when this cause was before us at a former term.

The fifth charge requested, should have been given, under the authority of *Mose v. State*, 36 Ala. 211; *Joe v. State*, 38 Ala. 422.

For the errors noticed, the judgment must be reversed and the cause remanded, the prisoner remaining in custody until discharged by due course of law.

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Indictment for Aiding Felon to Escape.

1. *Witness; competency of.*—Section 2302 of the Code of 1852, which changed the common law disqualification of witnesses, except in cases of perjury, &c. leaving the conviction as a matter directed to the credit of the witness, was omitted from subsequent revisions of the statutes; and being a law of a permanent and general nature, its omission under the provisions of the subsequent Codes, worked its repeal, leaving the common law rule as to the competency of witnesses in full force, except as altered by legislation.

2. *Same.*—At the common law, a person duly convicted of burglary, or grand larceny, was rendered infamous, and our statutes not having changed the common law rule, such person is not a competent witness.

3. *Board of Revenue of Montgomery; what best evidence of proceedings of.*—The “Board of Revenue of Montgomery,” is an inferior jurisdiction, required by statute to keep a record of its proceedings, and to appoint a clerk, who is keeper of its records. It has authority to hire out convicts sentenced to hard labor; and where a person deduces his authority to the custody of a convict from a contract with the Board, a transcript from its records, duly certified by the clerk, is the best mode of proving the exercise of its power.

APPEAL from Elmore Circuit Court.

Tried before Hon. JAMES Q. SMITH.

The opinion states the facts.

———, for appellants.

HENRY C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—Two witnesses, one of whom had been convicted of burglary, in the City Court of Montgomery, a court of competent jurisdiction, and the other of grand larceny, in the same court, were received as witnesses on behalf of the State, against the objection of the appellants. The judgments of conviction were in full force, and the witnesses were undergoing the punishment to which they had been respectively sentenced.

The rule of the common law is, that persons convicted of treason, felony, and the *crimen falsi*, were rendered infamous, and were disqualified as witnesses in cases civil or criminal. 1 Phill. Ev. 17; 1 Green. Ev. § 372; 1 Whart. Ev. § 397. The meaning of the term *crimen falsi*, which was borrowed from the Roman law, has not been defined with precision. It is generally accepted as embracing all offenses tending to pervert the administration of justice by falsehood or fraud.

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1 Phill. Ev. 17; *Cheatham v. State*, in MSS. The basis of the rule seems to be, that such a person is morally too corrupt to be trusted to testify—so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. Of such a person, Chief Baron GILBERT remarks, that “the credit of his oath is overbalanced by the stain of his iniquity.”—1 Green. Ev. § 372. The disability could be removed, but in the present case there is no averment that it had been, and it is not necessary to inquire when it was regarded as removed.

Grand larceny was at common law (and is under our statutes) a felony, and a conviction for it was a disqualification as a witness.—1 Whart. Cr. Law, § 760; 1 Whart. Ev. § 397, note 1. Burglary was at common law a felony, but within the benefit of clergy.—4 Black. 228. The definition of a burglar, as given by Sir Edward Coke, and quoted by Blackstone, is, “he that by night breaketh and entereth into a mansion house, with intent to commit a felony.” The offense at common law must have been directed against the habitation, and the constituents of it were, *time, place, manner, and intent*, all of which must have coexisted. The offense could be committed only by *night*, in no other *place* than the mansion or dwelling house, and only by a *breaking and entry*, and with a *felonious intent*; otherwise it was a mere trespass. Under our statute, the *time* of committing the offense is not material, it may be either in the *night* or *day time*; a *felonious intent*, or an *intent to steal*, is a necessary ingredient of the offense—and it is not complete, unless there is a *breaking and entry*. It is not only the *dwelling house*, but “any building, structure, or inclosure within the curtilage of the dwelling house, though not forming a part thereof; or any shop, store, warehouse, or other building, structure, or inclosure, in which any goods, merchandize or other valuable thing is kept for use, sale or deposit,” &c.—Code of 1876, § 4343. It is not the severity of punishment, but the nature of the offense, which creates legal infamy, and disqualification as a witness. The bill of exceptions does not disclose the particular species of burglary of which the witness was convicted—whether it was the offense as defined at common law, or the statutory offense. But it is not important whether it was the one or the other; it was a felony; and an intent to steal, or to commit a felony, must have attended the guilty act. It involves equal moral and legal turpitude with other felonies which disqualify, and is as inconsistent with the common principles of honesty, or humanity. The witnesses were, therefore, incompetent at common law, and that law,

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so far as it relates to the competency of witnesses, is the rule of decision, unless it has been changed by statute.

The Code of 1852 changed the rule of the common law, except as to persons convicted of perjury, or subornation of perjury, leaving the conviction as matter directed only to the credit of the witness.—Code of 1852, § 2302. This statute was not, however, carried into the Revised Code of 1867, and has not been since re-enacted. The 10th section of the Revised Code (as does the same section of the present Code) repealed all statutes of a *public, general, and permanent nature*, not included in the Code. The result is, the omission of the section of the Code of 1852, to which we have referred, from the subsequent revision of the statutes, operated its repeal, and the restoration of the common law.

“The Board of Revenue of Montgomery County” is an inferior jurisdiction, required by statute to keep a record of its proceedings. It is clothed with a very large part of the power, and jurisdiction, which was by the general statutes vested in the Court of County Commissioners, which is expressly declared a court of record. The declaration of the statute, is perhaps merely of the necessary legal result from the nature of the jurisdiction and power of the court, and the mode in which it is exercised. Of the officers of the “Board of Revenue,” the statute requires there shall be a clerk, who is made the keeper of its records. The hiring of convicts sentenced to hard labor for the county, is one of the powers of the Board, and its exercise is matter which should properly appear on its records. The better mode of proving the exercise of the power, when the person hiring deduces his authority to the custody of the convict from it, is a transcript of the record, duly certified by the clerk of the Board. Such a certified transcript, it is the exclusive duty of the clerk to make.

The improper admission of the witnesses, is an error for which the judgment must be reversed, and the cause will be remanded. The appellants must remain in custody until discharged by due course of law.

[Pinckard v. The State.]

Pinckard v. The State.

Indictment for Larceny of Growing Crop.

1. *Petit larceny; what indictment will not support conviction for.*—Under the statute making it a felony to steal any corn or cotton, “part of any outstanding crop”—this not being the subject of larceny at common law, and the statute having made it punishable as grand larceny only—there can be no conviction of petit larceny, though such part of the outstanding crop be described as the personal property of another, of value less than the amount necessary to constitute grand larceny.

APPEAL from Lee Circuit Court.

Tried before Hon. W. B. WOOD.

The appellant, Lee Pinckard, Sr., was tried and convicted under an indictment which charged that he “feloniously took and carried away one hundred and fifty pounds of cotton, being a part of the outstanding crop, and of the value of more than five dollars, the personal property of Wm. White, against the peace,” &c. The jury found the defendant “guilty of petit larceny,” and assessed a fine of “one hundred and fifty dollars,” and judgment was rendered accordingly. The indictment contained but a single count, and was demurred to as charging two separate and distinct offenses in the same count. The demurrer was overruled.

H. C. LINDSEY, for appellant.—The demurrer to the indictment ought to have been sustained.

This indictment is not provided for by the Code.

The two offenses are not of the same character, nor subject to the same punishment.

The case of *Gregg v. The State*, establishes that under an indictment for taking and carrying away a part of the outstanding crop, no conviction for petit larceny can be had.

Where certain acts are made *grand larceny* by statute, the new offense does not contain the elements of petit larceny.

H. C. TOMPKINS, Attorney-General, *contra*.

MANNING, J.—In *Gregg v. The State*, (55 Ala. 116,) it was decided that under an indictment for the statutory offense of stealing corn or cotton, “part of any outstanding crop,”—since this was not the subject of larceny at common law, and the statute made it punishable as grand larceny

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only—a verdict of guilty of petit larceny could not be lawfully rendered.

The present case does not materially differ from that. The charge against defendant is, that he “feloniously took and carried away 150 pounds of cotton, being a part of the out-standing crop * * * * of William White.”

Calling this personal property while yet part of an out-standing crop, or mention of its value at a low sum, did not justify the verdict that was rendered. It is equivalent to an acquittal of the statutory offense, and was unauthorized as a verdict for petit larceny, that crime not being charged.

Let the judgment be reversed and the cause be remanded.

Hill v. The State.

Indictment for selling or giving Spirituous Liquor to Minor.

1. *Code of 1876, section 4205, what act within.*—Under section 4205 of the Code of 1876, the ownership of the liquor given to a minor is immaterial. It is the voluntary delivery into the possession of a minor, or person of known intemperate habits, with or without any thing being given in consideration, which the statute denounces and punishes.

2. *Intent; what sufficient.*—No other intent is necessary to support a conviction, than that which the act of voluntarily delivering the liquor to a person of known intemperate habits, or to one known to be a minor, of itself imports. When this act is voluntarily done, the law is broken.

3. *Drunkenness; when no defense.*—As no particular intent, or mental status must have concurred with the act, to constitute the offense, the voluntary drunkenness of the defendant would furnish no defense, and constitute no excuse or palliation for the criminal act.

APPEAL from Lee Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellant, Dick Hill, was tried and convicted of giving liquor to one Robert Whitten, a minor. It was shown that on an election day, whiskey had been provided *for election purposes*, and the appellant had charge of, and permission to drink and give away the whiskey. While drinking, the minor asked him for a drink, and he gave it to him. There was evidence that the appellant was very drunk at the time. The appellant requested the following charges: “That if the jury believe, from the evidence, the defendant merely handed spirituous, vinous or malt liquor to a minor, as charged in the indictment, which said spirituous, vinous, or malt liquor belonged to some one else and not to defendant, they must

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find the defendant not guilty. 2. That if the jury believe, from the evidence, that the defendant, Dick Hill, was drunk at the time he gave the boy, Robert Whitten, the liquor, and in such state of mind that he did not know what he was doing, they may look to this as a fact, if the proof shows it to be a fact, tending to show that he had no criminal intent when he gave the boy the liquor, and that if they find he had no such criminal intent they must acquit him. 3. The jury must find from the evidence the existence of a criminal intent in the mind of the defendant, Dick Hill, before they can convict him as charged in the indictment. 4. A criminal intent is a necessary ingredient of the offense of giving or selling spirituous, malt, or vinous liquors to a minor, and that before the jury can find the defendant guilty, as charged in the indictment, they must find that he had the intent to violate the statute. 6. If the jury believe, from the evidence, that the defendant is not guilty as charged in the indictment, if they construe the terms of the statute under which this indictment is found in their ordinary and usual signification, then they must not find the defendant guilty, merely to carry out the spirit of the statute." Each of these charges was separately refused and a separate exception reserved.

W. P. PINCKARD, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—The indictment, in the prescribed form, charges the appellant with selling or giving spirituous, vinous, or malt liquors to Robert Whitten, a minor. On the trial, it was shown that, on an election day, whiskey had been provided *for election purposes*, and the appellant had permission to drink it himself, and give it to voters. While drinking, the minor asked him for a drink, and he gave it to him. The evidence tended to show the appellant, at the time, was very drunk. The appellant requested of the court six several charges, which were refused, and the refusal is the matter now insisted on as ground for the reversal of the judgment of conviction.

1. The first of these is, that merely handing to a minor spirituous liquor belonging to a third person, is not a violation of the statute. The words of the statute are: "Any person, whether with or without a license, who shall sell or give away spirituous, vinous, or malt liquors, in any quantity whatever, to minors or persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is guilty of a misdemeanor," &c.—Code of 1876, § 4205.

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The ownership of the liquor is not an ingredient of the offense. It is the voluntary delivery into the possession of a minor, or of a person of known intemperate habits, with or without any thing being given in consideration of the liquor, the statute denounces and punishes.

2. The remaining instructions proceed upon the idea, that a specific intent to violate the statute, is an essential element of the defense. No other intent is necessary, than that which the act of delivering the liquor to a person known to be a minor, of itself imports. When this act is voluntarily done, the law is broken.—*Bain v. State*, MSS. The drunkenness of the appellant did not excuse or palliate the offense. If a particular intent, or a particular mental *status*, must have concurred with the act, to constitute the offense, it would have been material to inquire whether the drunkenness of the defendant did not exclude such intent or state of the mind.—*State v. Bullock*, 13 Ala. 413; *Mooney v. State*, 33 Ala. 419. But voluntary drunkenness is no excuse or palliation of a criminal act. The instructions requested were properly refused, and the judgment must be affirmed.

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Indictment for Murder.

1. *Evidence; what inadmissible.*—A constable, and several persons whom he had summoned to aid in executing a warrant for the arrest of the defendant, went to defendant's house before day and aroused him, and in answer to a question of the defendant, as to who was present, the constable stated the names of several persons who were not in fact present—among them, one T. After this defendant shot and killed B., one of the *posse*. *Held*, error to permit the State, against the objection of the defendant, to show by T. that the constable had, in fact, summoned him, especially as the constable had not informed defendant of the fact; and the evidence being illegal, it necessarily worked a reversal of the case, the court being unable to determine that the evidence could not have prejudiced the defendant.

2. *Charge; what erroneous.*—A charge which postulates as one of the elements of self-defense, *real intent* on the part of the assailed to take life, or do some grievous bodily harm to the assailant, is erroneous. Such intent need not exist in fact; if by some present act or demonstration of the assailed, he induces in the mind of the slayer a reasonable belief that danger to his life or person is imminent, this is enough, though in fact the party slain had not such intent.

3. *Evidence; what inadmissible.*—Statements or threats by the deceased, a day or two before the killing, and not communicated to the slayer, are not admissible evidence in his favor, where the homicide is proved by direct evidence.

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APPEAL from Randolph Circuit Court.

Tried before Hon. H. D. CLAYTON.

The appellant, Henry Rogers, was indicted for the murder of one James P. Brazeale. The material facts may be thus stated : On the 26th day of August, 1876, one T. E. Heard, a justice of the peace, issued two warrants of arrest for the appellant, one of them for an assault with a gun, and the other for an assault with intent to murder. One James Burson was deputized to execute both warrants, and he summoned, as a *posse* to assist in the arrest, John Burson, William Thompson, Alexander Owens, J. R. Owens, and James P. Brazeale. Accompanied by this *posse*, said Burson, on the morning of the 28th of August, 1876, about an hour before day, went to the house of defendant for the purpose of making the arrest ; when they arrived, Burson called out, and the defendant asked him what he wanted, to which he replied that he had warrants for his arrest, and had come to execute them. Defendant replied that he knew what they were there for, "that James P. Brazeale had sworn a damned lie about a dog." Burson then told the defendant that one Alexander Owens had sworn out the warrant, and the defendant then asked Burson who were with him, to which he replied, that Jack Green, Warren Tally, and one Camp, were with him. Burson testified that they were not along with him, but that he told the defendant this to keep him from getting excited ; that he thought if he mentioned the names of the persons actually along he would excite him. This witness further testified that defendant came to the door and remained there until day light ; that he then commenced to read the warrants to defendant, and being unable to do so, he called one William Thompson to assist him, and that the defendant then replied after a portion of them had been read, "You need not read any more, if you had come by yourself or brought gentlemen with you, I would go with you, but you have brought a crowd of my enemies or damned rascals, and I will not go." He also said something about an intent to mob him. Burson further testified that he then told defendant that he had not come as a mob, but had come to execute civil process, and that he (Burson) stepped off to consult Alexander Owens as to his authority to arrest defendant by force, and that while speaking to Alexander Owens, the defendant threw a rock at Owens and shot and killed James P. Brazeale, and also shot at said Owens ; that Brazeale was in a stooping position, with a double-barrelled shot-gun in his hands when he was shot, and that he did not see Brazeale shoot. There was a conflict in the evidence as to the position in which said Brazeale had his gun at the time

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he was shot ; some of the witnesses testifying that it was in a shooting position, cocked and pointed at defendant, and others swore that the butt was sitting on the ground. One Bowers, a witness for the State, testified that about March, 1876, he saw defendant and asked him why he had not gone to sit up with a sick person in the neighborhood, and that defendant gave as a reason for not going that he did not want to meet his enemies ; that James P. Brazeale, Francis Brazeale, William Thompson and James Thompson, Alexander and J. R. Owens and others, had been to his house to run him off, and that if they came again for that purpose he would kill them. The State then offered to prove by Warren Tally, who was introduced as a witness for the State, that James Burson did summon him and one Jack Green to help arrest the defendant, and that for some reason they did not go with them. To the introduction of this evidence the defendant objected, on the ground that it was illegal, irrelevant, and incompetent, and on the further ground that the defendant was not shown to know that Tally and Green had been summoned; but the court overruled the objections, and the defendant excepted. Tally then testified that he and Green had been summoned to assist in the arrest, and to the giving of this testimony the defendant excepted. The defendant introduced evidence tending to show that he killed James P. Brazeale in self-defense, and that said Brazeale was on the opposite side of the fence near by with a double-barrelled shot-gun. There was also evidence that Brazeale and others had gone to the house of defendant, and given him notice to leave, and on the Friday before the killing (which occurred on Monday,) Brazeale and a crowd of others had gone to the house of defendant, and cursed and abused his family. It was also shown that Brazeale had been trying to get persons to sign an agreement to run appellant out of the country, and that the appellant had been informed of this fact before the killing. The defendant offered to prove by one Heard, that on the Sunday before the killing, Brazeale had said to witness, at the house of Warren Tally, "that he believed that the defendant had killed his dog, and that it would take two gallons of his (defendant's) blood to satisfy him for the killing of his dog." It was shown that this statement had not been communicated to appellant before the killing. The court, on motion of the State, ruled out all evidence as to such statements, and the appellant duly excepted.

This was, in substance, all the evidence, and the court charged the jury, among other things, that they might, in in this case, imply and infer malice from the character of the

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weapon used, unless the circumstances of the killing or other evidence overcame such inference. To the giving of this charge the defendant excepted. The court then gave the following written charge, at the request of the defendant: "If the jury believe from the evidence, that at the time of the homicide the circumstances were such as to impress the mind of the defendant with the reasonable belief that James Burson and the persons with him were about to do the defendant great bodily harm, and that danger appeared to the defendant to be imminent or threatening, then the jury must find the defendant not guilty." At the request of the State, the court gave the following charge as explanatory of the one last above set out: "To make out self-defense in this case, it is not enough that at the time of the killing the deceased had the apparent means of taking the life of, or doing great bodily harm to the defendant. There must have been an intent on the part of the deceased, coupled with the capacity, or seeming capacity, to take the life of the defendant, or to inflict on him some great bodily harm, and this intent must have been evidenced by some present act or demonstration of the deceased, inducing in the mind of the slayer a reasonable belief that the danger to his life or person was imminent." To the giving of this charge the defendant duly excepted. The jury found the defendant guilty of murder in the second degree, and fixed his punishment at ten years imprisonment in the penitentiary, and judgment was rendered accordingly. From this judgment the defendant appeals, assigning as error the various rulings to which exceptions were reserved.

SMITH & SMITH, for appellant.

HENRY C. TOMPKINS, Attorney-General, with whom was JOHN T. HEFLIN, *contra*.

STONE, J.—On two points, the judgment of conviction in the present case must be reversed. The testimony given by Warren Tally, that the officer, charged with the duty of making the arrest, summoned him and Jack Green to help arrest the defendant, could not have influenced the conduct or motives of the accused—especially, as the fact of such summons is not shown to have been communicated to the prisoner. We cannot know what influence this testimony may have exerted on the minds of the jurors; and, by an inexorable rule, this must work a reversal of the case.—*Campbell v. The State*, 23 Ala. 54; *Ogletree v. The State*, 28 Ala. 53; *Brock v. The State*, 25 Ala. 104.

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In the explanatory charge, given at the instance of the State, the court also erred. Its language is, "to make out self-defense, it is not sufficient that at the time of the killing the deceased had the apparent means of taking the life of, or doing great bodily harm to the defendant. There must have been an intent on the part of the deceased, coupled with a capacity, or seeming capacity, to take the life of the defendant, or to inflict on him some great bodily harm, and this intent must have been evidenced by some present act or demonstration of the deceased, inducing in the mind of the slayer a reasonable belief that the danger to his life or person was imminent." The error of this charge is, that it postulates as one of the elements of self-defense, a *real intent* on the part of the assailed, to take life, or inflict grievous bodily harm. Its language is, "there must have been an intent on the part of the deceased," &c. This constituent of the defense, like the others, need not necessarily exist in fact. If the intent be evidenced by a present act or demonstration, inducing in the mind of the slayer a reasonable belief that the danger to his life or person was then imminent, this is enough. And the jury must determine, from all the evidence, whether the slayer acted on such well founded belief, and in defense of his person, honestly believed to be in imminent peril; or, whether he was influenced by malevolent feelings. The true rule is laid down in *Harrison v. The State*, 24 Ala. 67; *Holmes v. The State*, 28 Ala. 17; *Dupree v. The State*, 33 Ala. 380.

We are aware that the charge we have been criticising is a substantial copy of the first head note in *Lewis v. The State*, 51 Ala. 1. That head note is scarcely justified by the opinion; but the opinion itself on this point, is a little confused. Taken altogether, it sustains the views above expressed. Appearances, calculated to produce in a reasonable mind, and really producing conviction of impending peril to life or limb, is what is meant by *seeming danger*. Juries must judge of this, and determine whether the blow was the result of such well grounded fear, or whether the appearances were made a pretext or excuse for unnecessary, or excessive violence. To justify the taking of human life, there must be, or reasonably appear to be, imminent, pressing, present danger to life or limb, not brought about by the aggressive act of the person thus threatened, and from which there is no other safe mode of escape. See *Mitchell v. The State*, December term, 1877.

The ruling of the Circuit Court, on the testimony of the witness Heard, excluding statements of Brazeale made to witness on Sunday before the killing, and not shown to have

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been communicated to the accused, was in accordance with the decisions of this court, and is free from error.—*Powell v. The State*, 19 Ala. 577; *Carroll v. The State*, 23 Ala. 38; *Dupree v. The State*, 33 Ala. 380; *Edgar v. The State*, 43 Ala. 45; *Burns v. The State*, 49 Ala. 370.

Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

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Trover.

1. *Contract; what authorizes rescision of.*—A vendee imposed on by the fraud of a vendor, may repudiate the contract of purchase, upon its discovery, and recover back the consideration paid; and the fact that the contract of sale is in writing, will not prevent the admission of parol evidence of the fraud or misrepresentation.

2. *Fraud; how may be shown.*—Where the false representation imputed to the vendor of a patent right to use a certain process of tanning, consists of the statement that leather tanned by the process was as durable as leather tanned with bark, its falsity may properly be shown by the evidence of persons who have tested the durability of leather tanned by it.

3. *Expert; who is.*—The owner of a tan-yard, who has been engaged in the business of tanning for twenty-three years, "seeing the work going on, and knowing how it was done," is an expert as to such matters, though he may have employed others to do the work for him, and is not a "practical tanner."

APPEAL from Clay Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

This was an action brought by the appellee, E. R. Wood, against the appellant, James M. Nelson, to recover damages for the conversion of a certain promissory note. On the trial, Wood, as a witness for himself, testified that in the spring of 1874 he purchased of Nelson the right to use "Peters' Eureka Tanning Process," in the county of Chambers, in this State, for which he paid him the note described in the complaint, and received from him a deed of the right to use said process in Chambers county, and also printed directions for the use of the process; that the defendant, Nelson, represented, when they were negotiating the trade, that this process would tan any kind of hide in from one to thirty days; that it would make as good leather as the old bark process of tanning; that it would tan heavy leather; that the leather tanned by this process was strong and durable; and that at that time Nelson showed him samples of leather, said to be tanned by the "Process," which were very strong and plia-

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ble. Defendant objected to any evidence of statements or representation alleged to have been made at or before the sale of the right to plaintiff, upon the ground that the same was illegal, and because the written contract entered into at the time, and the guaranty it contained, were the highest and best evidence of the terms of the trade, and of what was guaranteed by Nelson. Each of these objections was overruled by the court, and defendant excepted. Plaintiff further testified that he was not a tanner, and that he had never tried the process of tanning, and of his own knowledge knew nothing of what it would do. Witness also testified that he had a pair of shoes, made out of leather tanned by this process, and that the shoes were of an inferior quality, not lasting as long as shoes made out of leather tanned by the old bark process. To the evidence of this witness concerning the shoes owned by him, defendant objected, the court overruled his objections, and he excepted.

The plaintiff then introduced one Barnes, who testified "that he was not a practical tanner, but had owned a tannery for twenty-three years; that he employed a skilled workman to do the tanning in his yard, but that he had looked after his tanning interest in person during these years, and had seen the tanning going on all the while, and knew how it was done." This witness further testified that he bought the "Eureka Process" in 1873 and 1874, and tried it nine or ten months at his tannery; that in trying the process he followed the directions printed in a book given him by Nelson, (which directions were shown to be the same as those given by Nelson to plaintiff,) and that in his opinion the process was of no value. Defendant objected to the evidence of the opinion of this witness, on the ground that there was positive evidence that witness was not a practical tanner, and because the evidence failed to show that witness was an expert. The court overruled these objections, allowed the evidence to go to the jury, and the defendant excepted. The jury found for the plaintiff, and judgment was rendered accordingly. Nelson brings the case here by appeal, and assigns the various rulings to which exception were reserved as error.

GEO. W. PARSONS, for appellant.

TAUL BRADFORD, *contra*.

BRICKELL, C. J.—1. A purchaser, imposed on by the fraud of the vendor, may repudiate the contract of sale upon the discovery of the fraud, and recover back the money or

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things given as the consideration. The fraud may not be actual—it may consist in the representations by the vendor of the quality of the thing sold—representations not known to be untrue, but which prove untrue, on which the vendee relied, and had the right to rely. The fact that the contract of sale is in writing, does not preclude the admission of parol evidence of the fraud or the misrepresentation.—*Cozzens v. Whitaker*, 3 St. & Port. 322; *Dixon v. Barclay*, 22 Ala. 370; *Blackman v. Johnson*, 35 Ala. 252.

2. A false representation imputed to the vendor, was that leather tanned by the process, the patent right of which was the subject of sale, was as durable as leather tanned with bark. The falsity of the representation could be properly shown by the evidence of persons who had, by use, tested the durability of leather tanned in each mode.

3. The long acquaintance and ownership of a tan-yard, carrying on the business of tanning, entitled the witness, Barnes, to testify as an expert, though his occupation was not that of a tanner, and he had not, with his own hands, worked in tanning. He had ample opportunities of acquiring superior knowledge in reference to the value of this particular process of tanning, accompanied with practical experience, and this we understand is all that the term *expert* implies. The admission of the evidence is supported by the following decisions of this court: *Spiva v. Stapleton*, 33 Ala. 171; *Cheek v. The State*, 38 Ala. 227; *Moore v. Lea*, 32 Ala. 375; *Winter v. Burt*, 31 Ala. 33; *Tullis v. Kidd*, 12 Ala. 648; *Hall v. Goodson*, 33 Ala. 277.

Affirmed.

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Indictment for Arson.

1. *Arson; what sufficient allegation of ownership, in indictment for.*—Under our statutes, as at common law, arson is an offense against the possession rather than the property, and the possession, not the tenure or interest in the property, must be described; hence, in an indictment under the statute for the arson of a crib, ownership is property laid in one tenant who had actual possession and exclusive occupancy of the premises on which it was situate, under the contract with the co-tenant, though the fee was in the two jointly, as tenants in common.

APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

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The appellants, Joshua Adams and Crosby McIntosh, were jointly indicted, tried and convicted for the burning of a crib. The indictment averred that it was the property of one Caleb N. Williams. It appeared, on the trial, that the crib was situated on a plantation which was owned jointly by the said Caleb N. Williams and one N. L. Atkinson, but that Williams was in the actual possession of the place, under a contract with Atkinson, by which the profits annually arising from its cultivation, (after deducting the expenses of cultivation) and two hundred and fifty dollars compensation to Williams for personal services, in overlooking the farm, were to be divided equally between them. The defendants requested the following written charges: "1. If the jury believe from the evidence that the property burned belonged to Caleb N. Williams and N. L. Atkinson, as tenants in common, they must find the defendants not guilty. 2. If the jury believe from the evidence that the house which was burned, and for which the defendants are charged in the indictment, was the property of Caleb N. Williams and N. L. Atkinson, and not the individual property of Caleb N. Williams, then they must find all the defendants not guilty. 3. If the jury believe from the evidence that at the time of the burning, the crib burned was the property of Caleb N. Williams and N. L. Atkinson, as tenants in common, and not the individual property of Caleb N. Williams, and that said Williams was in the actual possession of said property, holding both for himself and Atkinson, then they must find the defendants not guilty. 4. If the jury believe from the evidence that the property burned was at the time of the burning owned by Caleb N. Williams and N. L. Atkinson, as tenants in common, and that at said time said Williams was in the actual possession of said property, under a contract made between himself and said Atkinson, by which he, Williams, was to run the plantation upon which the crib was situated, and out of the proceeds thereof pay all expenses, then reserve two hundred and fifty dollars for his own services, and the balance, if any, to be equally divided between Williams and said Atkinson, then they must find the defendants not guilty."

The court refused to give each of said charges, and the defendants separately excepted, and now assign such refusals as error.

ROBINSON & DENSON, for appellant.—Williams held the crib both for himself and Atkinson, and the indictment ought to have laid ownership in both of them.—See *Glandfield's case*, 2 East, P. C. 1034; *Commonwealth v. Wade*, 17

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Pick. 393; *Martin v. The State*, 26 Ala. 72. The possession of one joint tenant is the possession of both, and the contract in this case shows that there was no severance of the possession.

H. C. TOMPKINS, Attorney-General, *contra*.—The proof in this case was that the house alleged to have been burned was the joint property of Williams and Atkinson, but that Williams was in the actual possession and control of the premises, under a contract that gave him charge thereof; it further showed that Atkinson was not living on the plantation on which the house was situate, and had nothing to do with the control of it. Arson is an offense against the possession, and it is sufficient to aver and prove that the building burned is the property of the person merely occupying.—Mathews' case, 55 Ala. 65; 2 Bishop's Crim. Pro. § 63 and 109; 2 Whorton Crim. Law, § 1677; *People v. Van Blaicum*, 2 Johnson, 105; *The State v. Taylor*, 45 Maine, 322.

BRICKELL, C. J.—The indictment is founded on the statute, (Code of 1876, § 4348,) for arson in the third degree, and charges the defendants with having set fire to or burned *a crib, being a house or building, and the property of Caleb N. Williams*. The evidence, on the trial, showed *the crib* was the property of said Williams and N. L. Atkinson, as tenants in common, but Williams had the exclusive possession, and was in the actual occupancy of the premises on which *the crib* was situate, under a contract with Atkinson, by which the annual profits of cultivation, after deducting the expenses and two hundred and fifty dollars compensation to Williams for his personal services in superintending the cultivation, were to be equally divided between them. The Circuit Court ruled ownership of the crib was properly laid in Williams, and that ruling, it is now insisted, was erroneous. An indictment for arson at common law, or in either of its degrees, as defined by the statutes, must aver the ownership of the house or other property which is set fire to or burned. But at common law, and under the statutes the offense is against the possession rather than the property.—*Snyder v. People* 26 Mich. 106; *The State v. Toole*, 29 Conn. 344; *Davis v. The State*, 52 Ala. 357; *People v. Van Blaicum*, 2 Johnson, 105. The possession, not the tenure or interest in the property, must be described.—2 Whar. Cr. Law, §§ 1610-11, 1677; 1 Bish. Cr. Pro. § 573. Therefore, at common law, the offense reaching only the dwelling house, the indictment must not have averred it was the house of him in whom the fee resided, if in fact another had the actual occupancy,

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even though the occupancy was wrongful.—*Snyder v. People, supra.* Williams having the actual and rightful possession of the crib, and the premises on which it was situate, ownership in him was properly laid in the indictment.

We find no error in the record, and the judgment must be affirmed.

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Action for Breach of Warranty.

1. *Agent; power of, to give warranty.*—A general agent to sell, without express authorization from his principal, may bind him by such express stipulations as are usual and customary in effecting the sale; and though in some cases—as the sale of a slave, &c., where the agent gave a warranty of soundness—the court will declare the extent of the agent's authority in this particular, as matter of law, the extent of the agent's authority to bind his principal by express stipulations, is, in general, a question for the determination of the jury, in view of what is usual and customary with reference to such sales.

2. *Same.*—A general agent for the sale of Herring's Safes, has no authority, merely by virtue of his agency for their sale, to warrant them burglar proof; and whoever relies on such warranty, must show either express authority, or a custom to give such warranty, in making such sales, before the principal will be bound.

3. *Principal; what act of, amounts to ratification of agent's acts*—The receipt by the principal of the price of a safe which the agent sold, and without authority warranted to be burglar proof, will not amount to a ratification of the warranty, unless received or retained by the principal, with knowledge of the warranty.

4. *Evidence; what admissible.*—Where the agent's authority to warrant a safe as burglar proof, and the making of such warranty, are controverted in a suit against the principal, the latter may show by the agent that he had no express authority to make the warranty; and where the agent, pending the negotiations for the sale, exhibited to the purchaser a descriptive pamphlet, with which the agent was furnished, showing what classes of safes were and what were not represented as burglar proof, the pamphlet is competent evidence in behalf of the principal on the issue of warranty *vel non*.

5. *Charge; what exception to, unavailing.*—A mere general exception to the entire charge of the court, consisting of separable and distinct propositions of law, will not avail the party excepting, unless the entire charge is erroneous.

6. *Evidence; what inadmissible.*—Witnesses, particularly parties, should not, as a rule, be allowed to testify to secret uncommunicated motives of their own conduct, *thus*: in an action against a safe manufacturer (by a purchaser through the agent who warranted it burglar proof) seeking to recover as part of the damages, a sum of money lost by burglars breaking open the safe,—the purchaser can not be permitted to state that, "had he (I) known the real thickness of the safe, I would not have risked my money in it as I did;" though he may testify that he did not know the real thickness until after the safe was broken, and that he confided in the agent's representations; and it is for the jury to draw the inference, whether the purchaser would have risked his money in the safe had he known its real thickness.

7. *Damages; measure of.*—In the absence of fraud or bad faith, the proper measure of damages, in a suit by the purchaser of a safe against the maker,

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who warranted it "burglar proof," is the difference between the value of the safe as it was, and what it would have been worth, if it had been as represented; and not the damages sustained in the loss of valuables taken out of the safe by the burglars who effected an entrance into it.

8. *Same.*—To constitute a fraud in such a case, which will authorize recovery for the value of articles lost in the safe, there must be something more than the mere assertion that the safe was burglar proof; there must have been an assertion as a fact, of that which the seller knew to be false; or a reckless affirmation that the safe was burglar proof, when the seller did not know whether the assertion was true or false; or a knowledge on the part of the seller that the safe was not burglar proof, and a failure to communicate that knowledge, when the seller knew the purchaser was contracting for the safe as burglar proof, and the purchaser, trusting to these representations, must have been deceived by them.

9. *Same; when recoverable.*—When, in such a case, the sale was made by an agent, and the suit is against the principal, damages resulting from the loss of valuables in the safe, can not be recovered, unless it be shown that he was a guilty participant in the agent's fraud.

APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

The appellee, Newton J. Skaggs, brought this action against the appellants, Herring, Farrell & Sherman, to recover damages for the breach of a warranty of a safe, sold by them to him. The safe was purchased from one Stewart, as the agent of appellants. The complaint contains three counts, the first two of which allege that the appellants, falsely and knowingly, represented to him that the safe sold was made of a peculiarly tough kind of iron, and would withstand any attempt by a burglar, armed with approved implements of his trade, to enter it for twenty-four hours, and of two burglars, similarly armed, for the space of twelve hours; and that, upon the faith of these representations, plaintiff purchased and paid for the safe; that he placed money and other valuables in the safe, which were lost by the safe being opened and robbed. The third count avers that the defendants were dealers in iron safes, and did employ an agent, and authorized him to sell such safes, and did hold him forth to the public residing in and about the town of Talladega and elsewhere as their general agent for the sale of iron safes, and such agent being in the exercise and discharge of his duties and employment as such agent, sold the safe to plaintiff; that during the negotiations for the sale of said safe, he represented that the safe was made of a peculiarly tough kind of iron, one-half inch in thickness, that could not be entered by a burglar, armed with approved tools, in twenty-four hours, or by two burglars, similarly armed, in twelve hours; and plaintiff avered that the representations so made by him, as aforesaid, by the agent of defendants, were wholly false, and that said agent then and there knew them to be false, and that they were fraudulently made with intent to deceive

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and injure plaintiff, and induce him to make said purchase. Each count of the complaint was separately demurred to, it being assigned among other grounds of demurrer that the damages claimed are too remote. The third count was demurred to, because there is no averment that the alleged agent had authority from defendants to make said alleged false representations, or that the defendants knew he had made them when they received the benefits of the contract made by him. Those demurrers were overruled.

The plaintiff Skaggs, as a witness in his own behalf, testified that he purchased the safe from Stewart as the agent of appellants; that he had several interviews concerning the sale with him, and in each of these he represented that the safe was made of an unusually hard, tough kind of iron, three-eighths to one-half inch in thickness, and that it was capable of resisting the efforts of a skilled burglar, armed with approved implements, to enter it for twenty-four hours, and of two burglars, similarly armed, for twelve hours; that he put the safe in his store and deposited in it his money and valuables; that said safe was cut open, on the top, with an axe, or some sharp instrument, and money to the amount of about five thousand dollars and a gold watch taken out; that the iron of the safe was very thin, much less than three-eighths of an inch in thickness (about one-sixteenth of an inch), and that it appeared to have been cut and turned back as a sardine-box is turned when opened. In the course of his examination, Skaggs testified that if he had known the real thickness of the iron of the safe, he would not have risked his money in it as he did. To this testimony the defendants objected, "because it is not legal evidence." The court overruled the objections, and they excepted.

Stewart, the alleged agent, was then examined, and after testifying to the circumstances of the sale, he was asked by the defendants, if he had any authority to warrant the safe sold as burglar proof. The plaintiff objected to this question; the court sustained the objection, and defendant excepted. The defendants then offered to prove by the witness, that he had no authority to represent the safe sold to plaintiff as burglar proof, or as any thing but an improved fire-proof safe. The plaintiff objected to this proof, the court sustained the objection, and defendants excepted. Defendants then offered to prove by said witness, that he had present during the negotiations with plaintiff, a pamphlet published by the defendants, containing an accurate description of the sizes and qualities of the safes made by them, and the difference between burglar-proof and fire-proof safes, and in connection with this testimony offered the pamphlet

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in evidence. The plaintiff objected to this evidence, the court sustained the objection, and the defendants excepted.

Several witnesses testified as to the real thickness of the iron of the safe, and its appearance after the robbery. The defendants also introduced the list of taxable property which was returned by Skaggs to the tax assessor, in which no mention is made of any money kept on deposit or hoarded.

This was substantially all the evidence, and the court charged the jury in writing. The charge is very lengthy, and the only exception to it, or any part of it, is in the following words, "to each of which the defendants excepted." The court, at the request of the plaintiff, gave the following written charges: 2. What is meant by preponderance of evidence, is that superior weight of evidence which satisfies the mind of the jury of its truth, even when considered in connection with all adverse evidence. 3. If you believe, from all the evidence, that Skaggs had the money and property he testified that he had in the safe at the time of the robbery, then upon the issue as to whether or not he had such money and property in the safe at that time, you must find in his favor, no matter what returns the said Skaggs may have made of this property to the tax assessor. 4. The mere assertion of defendants' counsel as to any matter connected with the cause, have no more authority than the assertions of plaintiff's counsel touching the same matters. To each of these charges the defendants separately excepted. The various rulings to which exceptions were reserved are now assigned as error.

WALDEN & PARSONS, for appellants.—Where a purchaser has been induced to buy through the fraud of an agent of the vendor, the latter being innocent, the purchaser may maintain an action for deceit against the agent personally; but he can not maintain that, or any action in tort, against the innocent principal.—Benjamin on Sales, 375; 36 Ala. 343; 22 Ala. 629; 7 Ala. 622; 1 East, 106. It was certainly competent for the defendants to show, that no authority had been given to Stewart to warrant the safes. It tended to shed some light on the controverted question of warranty *vel non*. And for the same reason, the pamphlet shown to have been used in the negotiations, should have been admitted. It was erroneous to allow the plaintiff to testify that, if he had known the real thickness of the iron, he would not have risked his money in it as he did. Such testimony of a party should not be received, concerning the secret, uncommunicated motives of his own conduct.—36 Ala. 120; 9 Ala. 875; 14 Ala. 743.

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SAMUEL F. RICE, *contra*.—The principle on which the complaint and recovery of the appellee is based, is not only salutary, but essential to the attainment of justice, and supported by the highest and best authorities.

It is this—that when the vendor sells a thing *for a particular purpose*, and defrauds the vendee in respect to *its fitness for that purpose*, he is liable for all the damages directly resulting from the prudent use of the thing for such purpose. *The act of selling*, under the circumstances, and affected with the knowledge the seller had of the inducement and purpose which was influencing the buyer in making the purchase, *was equivalent to an affirmative representation* that the property was suited for that purpose, and rendered the seller *an active participant* in giving effect to the *delusion or belief which caused the injury*, and made the seller guilty of deceit. *Maynard v. Maynard*, 49 Vermont Rep. 297, and cases therein cited.

The defendants having received the benefit of the purchase are not permitted to repudiate the deceit of their agent, authorized to make the sale.—*Atwood v. Wright*, 29 Ala. R. 351; Perry on Trusts, old edition, § 211, and cases cited in note 8 thereto.

STONE, J.—In *Skinner v. Gunn*, 9 Por. 305, speaking of the power of an agent to bind his principal, this court said: “The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of that power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, as that is a usual and ordinary stipulation in such contracts, and must therefore be implied to effectuate the object of the power.” The court, in the same case, had said, “An authority to do an act, must include power to do every thing usual and necessary to its accomplishment.” This doctrine was reaffirmed in *Gaines v. McKinley*, 1 Ala. 446, and in *Cocke v. Campbell*, 13 Ala. 286. It will be observed that, in these cases, the court states, *as matter of law*, that power given to sell a slave carried with it power to warrant his soundness, in the absence of prohibition. A similar principle is found in the books, in reference to the power of an agent to bind his principal, by warranty of the soundness of a horse he is authorized to sell. It is a “usual and ordinary stipulation in such contracts,” say the courts. Perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge. Certainly it was not intended to be affirmed, that an agent with general powers of sale, has unlimited power to bind his principal, by

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any and every stipulation the various phases of traffic may be made to assume. If so, the words, "in the absence of prohibition," found in the case of *Skinner v. Gunn*, *supra*, are meaningless and powerless. In the case of *Fisher v. Campbell*, 9 Por. 210, a question arose on the implied power of an agent to bind his principal. That was the case of a non-resident planter, whose overseer in charge made purchases of supplies for the plantation and hands. It was proved that the employer had given the overseer instructions to purchase pork for his slaves from a particular mercantile house at Montgomery, with whom he had made arrangements for that purpose, and had given him no directions to buy any where else, nor had he any authority to purchase from any other person. The plantation was in Lowndes county, and, the roads being bad, the overseer purchased pork in his own county, much nearer to him, and at Montgomery prices. Commenting on a charge requested by plaintiffs, and refused by the court below, this court said, "The last branch of the charge is stated as a corollary from the preceding propositions; 'that any special directions given to McMay [the overseer] by the defendant, as to the place of purchasing, was wholly immaterial as to this purchase, unless from the evidence they were satisfied that plaintiffs were *informed* at the time of such sale of such special directions; and that without this information, the plaintiffs would be entitled to recover, if the proof was fully made out.' We understand the law to be the exact converse of this proposition. When a person deals with one who professes to be the agent of another person, the person contracting with him is bound to know the extent of his authority."—See, also, *McCreary v. Slaughter*, 57 Ala.

We are not prepared to assent to the doctrine, in unlimited sense, that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. In Benjamin on Sales, § 624, is the following language: "Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." We fully approve and adopt this language of this very accurate writer. We do not intend, however, to overturn the doctrine

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declared in *Skinner v. Gunn* and *Cocke v. Campbell*, *supra*. As a general rule, the agent has power to do whatever is usual—to enter into such express stipulations as are usual and customary—in effecting such sales. What stipulations are usual and customary in effecting such sales, is not always matter of judicial knowledge. It is declared in the sales of slaves and horses to be within the knowledge of the court that it is usual to give warranties. It can not be affirmed that such custom exists in the sale of all chattels. Generally, and we hold in a sale like the present, “it is a question for the jury to determine what is usual.” This, in the absence of express authority in the agent to warrant; for if the agent had such express authority, then his act is the act of his principal. And, in the absence of express authority, the question arises, and it is one for the jury, whether such warranty is customary in the sale of safes. If the jury, on the evidence, find there was such custom, then the principal is bound, “in the absence of prohibition” resting on the agent, and brought to the knowledge of the purchaser, to the same extent as if the principal had himself given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound. True, if the principal ratified the act of such agent, although the act itself had been unauthorized, this would bind the principal. But the receipt of the purchase-money would have no such effect, unless received or retained with knowledge that the agent had given the warranty.

The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes, to warrant them as burglar proof. Either the express authority, or the authority implied from such proven custom, would constitute the act of the agent the act of the principal; but the law does not imply the authority from the fact that Stewart, who conducted the sale, was a general agent. The third count of the complaint avers that the defendants “did employ an agent, and authorized him to sell such safes, and did hold him forth to the public residing in and about the town of Talladega, Alabama, and elsewhere, as their general agent for the sale of iron safes.” This is the entire averment of authority, and we hold it insufficient. It should have been averred that the agent had authority to make the warranty. Being averred, proof of express authority, or custom to warrant, would have sustained the averment. The 3d count is insufficient, and the demurrer to it should have been sustained.

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Under the principles above declared, it became a material inquiry whether Stewart had express authority to warrant the safe as burglar-proof. He should have been permitted to prove he had not such express authority. True, this would not necessarily exonerate the defendants. It would bear on only one phase of the inquiry; for, if such warranties are usual and customary in the sale of iron safes, then even a prohibition of such authority to the agent would amount to nothing, unless knowledge of such prohibition was carried home to the purchaser before the sale was consummated. So, if the published descriptive pamphlet with which the agent was furnished, tended to disclose what classes of safes were, and what were not represented as burglar-proof, and such pamphlet was exhibited to the purchaser pending the negotiation, then that pamphlet should have been allowed to go to the jury, as shedding some light on the controverted question of warranty *vel non*.

The charge of the court, given in this case, was in writing, covering all the points deemed material by the presiding judge. It is a continuous thing, and not divided into separate charges. Many of its utterances are free from error, because they assert plain and uncontroverted principles of law. This general charge covers six folio pages, and the only exception to it is in the following language: "To each of which the defendants excepted." This must be treated as a general exception to the whole charge, and under our rulings, must be disregarded, unless the whole charge is erroneous. A portion of it, at least, being free from error, the appellant can take nothing by this assignment of errors.—*Jacobson v. The State*, 55 Ala. 151. So, the three charges given at the request of the plaintiff below are each free from error.

Against the objection and exception of defendants, the plaintiff was permitted to testify as follows: "If I had known the real thickness of the iron of the safe, I would not have risked my money in it as I did." This was simply proving a reason or motive, not communicated, for doing the act which resulted in the loss of the money. Plaintiff could have testified as a fact that he had no personal knowledge of the thickness of the iron until after the safe was hewn open, and that he confided in the representations of Stewart as to its thickness and hardness. The jury then, if they believed this testimony, would have drawn their own inferences, as to whether the plaintiff would or would not have risked his money in the safe, if he had known the true thickness and temper of the metal. This was eminently a function of the jury. But witnesses, particularly parties, should not, as a rule, be allowed to testify to secret, uncommunicated mo-

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tives of their own conduct.—*Clement v. Curreton*, 36 Ala. 120; *Gibson v. Hatchett*, 24 Ala. 201; *Jones v. Hatchett*, 14 Ala. 743; *Goodman v. Walker*, 30 Ala. 482; *Whetstone v. Br. Bank*, 9 Ala. 875.

The demurrers also raise the question of the right to recover for the money and watch alleged to have been taken from the safe. The appellant contends these damages are too remote. The doctrine of this court, affirmed in many cases, is, that "the damages which are recoverable must be the natural and proximate consequence of the act complained of."—1 Brick. Dig. 522, §§ 8, 9, 10; *Burton v. Holley*, 29 Ala. 318; *Ivey v. McQueen*, 17 Ala. 408. It is said that the question of the extent of recovery on a breach of warranty has been much discussed of late, and the tendency of modern decisions is, to extend the right of recovery to all the consequences of the breach, where there is fraud in the representation, or stipulation. And in many cases it has been held, that when a manufactured article is sold for a known specific use, and it is not reasonably fit for the purpose, the right to damages goes beyond the bounds which limit the responsibility for an ordinary breach of warranty, and includes compensation for the mischief resulting from the failure of the article warranted, to answer the special purpose to which it is applied. And this doctrine has been sometimes applied in the sale of articles other than manufactured goods. In the case of *Randall v. Roper*, Ellis B. & E. (Q. B.) 84, seed barley had been sold, and warranted to be "chevalier seed barley." The barley was sown, and proved to be an inferior and less productive variety of barley. The barley received was less valuable by 15£. than the same quantity of chevalier seed barley would have been; but it was proved that the purchaser lost in the yield of his crop, by reason of the difference, the sum of 261£. 7s. 6d. It was held that the loss in the yield was the natural result of the breach of warranty, and the plaintiff had judgment for that sum. So, in *Bowdaille v. Brunton*, 8 Taunton, 535, a chain cable had been sold as a substitute for a rope cable of 16 inches, and warranted to last two years. A link of the chain broke within the two years, by which the chain and the anchor were lost. The recovery was for the value of both the chain and the anchor, Chief Justice Dallas remarking, "the holding of the anchor by the cable is of the essence of their warranty." In the case of *Mullett v. Mason*, 1 Com. Pleas Law Rep. 559, a cattle dealer had sold a cow, and fraudulently represented she was free from infectious disease, when he knew she was not. The purchaser placed the cow with five other cows, who contracted the disease and all died. Held, that the purchaser

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was entitled to recover the value of all the cows as damages. The court said, "the defendant is liable for all the direct consequences of the plaintiff treating the cow as if it was free from any infectious disease, and placing it, as he naturally would, with other cattle, and the death of the other cows was a direct consequence of his doing that." Speaking of this case, and of the rule of damages in such cases, Mr. Benjamin, in his work on sales, § 904, says: "The damages recoverable by the buyer for a breach of warranty may be greatly augmented, when they are the consequence of a fraudulent misrepresentation by the vendor." And the following authorities are to the same effect: *Kingsbury v. Taylor*, 29 Me. 505; *Emerson v. Brigham*, 10 Mass. 197; *Stone v. Dermay*, 4 Metc. Mass. 151; *Winz v. Morrison*, 17 Tex. 372. So, in *Passinger v. Thorburn*, 34 N. Y. 634, it was ruled that "where the defendant sold cabbage seed, and warranted the same to produce Bristol cabbages, which warranty was untrue, the damages would be the value of a crop of Bristol cabbages, such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom." In delivering the opinion of the court, Davies, Ch. J., said: "The damages [on breach of warranty,] must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation." Further on he said: "In the present case it can not be doubted that the damages which the plaintiff has sustained, are such as arise naturally from the breach of the defendant's warranty. His engagement was, that the seed he sold was Bristol cabbage seed, and would produce Bristol cabbages. It may, therefore, have been reasonably supposed to have been in the contemplation of the parties that if the seed was not Bristol cabbage seed, and would not consequently produce Bristol cabbages, that damage would necessarily accrue to the plaintiff, and would be a natural consequence of such breach. The jury have so said in this case, and we think they came to a correct conclusion." The case of *Flick v. Wetherbee*, 20 Wis. 390, presented substantially the same question, and was ruled in the same way. Each of these cases arose on warranty, without any imputation of *scienter*, *suggestio falsi*, or *suppressio veri*. Fraud cut no figure in them; but it was ruled that the damages complained of and recovered, must have been within the contemplation of the parties. And it is certainly true that in each of the cases last cited, the injury or damage for which the recovery was had, was the direct, known result of the absence of the quality the com-

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modities were warranted to possess.—See, also, *White v. Madison*, 26 N. Y. 117.

Some well-considered cases take a distinction between cases of mere breach of warranty, and cases of fraudulent representation of qualities not possessed, or fraudulent concealment of known unfitness for the service the seller knows the buyer has in view in making the purchase. In *Bluet v. Osborne*, 1 Starkie, 384, a bowsprit was sold, which, at the time, appeared to be sound, but was in fact rotten. Consequential damages were claimed, going beyond the mere value of the bowsprit, if it had been sound. The court, Lord Ellenborough, said: "No fraud is complained of, but the bowsprit turned out to be defective upon cutting it up." And he ruled that the measure of recovery was the value of the bowsprit if it had been sound. In the case of *Maynard v. Maynard*, 49 Vermont, 297, the seller knew of the defect in the animal, and fraudulently concealed it. The action was case for the deceit. Large consequential damages were recovered. The principle of the decision is correctly stated in the head note, as follows: "Plaintiff, in purchasing a bull of defendant, informed him that he wanted the bull to put with his cows, but did not ask him whether or not the bull was suitable for that purpose. The bull, though sound in appearance, was, to the knowledge of the defendant, without the power of propagation. Defendant did not disclose his knowledge of that defect, but otherwise used no means to conceal the defect, or in any way to mislead or deceive plaintiff. Held, that plaintiff might show that his cows, on account of not having been gotten with calf, produced less butter than they had been accustomed to produce."

The case of the defective cable above is one of extreme, if not of questionable application of principle. So, in *Brown v. Edgington*, 2 Man. & Gran. 279, the doctrine was carried to extreme results. A wine merchant had ordered a crane rope from a dealer, who represented himself as a manufacturer of ropes, and notified the dealer, who took the dimensions, that the rope was wanted to raise pipes of wine from the cellar, and that it must be adapted to that use. In fact, the dealer procured the rope to be made by another, but this fact exerted no influence in the cause. The rope proving defective, parted in the act of hoisting a pipe of wine, by which the wine was lost. The recovery seems to have been, not only for the defective rope, but for the value also of the pipe of wine. The court held that "where a contract is, expressly or impliedly, to furnish goods of a particular description, a warranty is created that they shall be of that descrip-

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tion." Nothing was said, either in the argument of counsel, or in the opinions of the judges, on the question of the loss of the wine being too remote, to justify a recovery therefor. It should, perhaps, be observed that in all these cases, except *Mallett v. Mason*, the injuries resulted directly from the known use for which the articles were procured, without extraneous interference or adventitious circumstances, and purely from inherent defects or inaptness for the service required. They were the natural consequence of the falsity of the warranty. In a note to Sedgwick on Damages, 4th Ed. pp. 334-5, it is said: "By the doctrine of the late decisions, when for the want of a certainly defined, existing and intrinsic quality which an article sold is warranted by the vendor to have, consequential damages naturally ensue as the direct result of its application by the vendee to the purpose for which he intended it, and the vendor knew he intended it, the vendor is liable for such damages."—See, also, *White v. Miller*, 71 N. Y. 118.

In the cases of *Kingsbury v. Taylor*, *Emerson v. Brigham*, and *Stone v. Denny*, *supra*, the measure of recovery was stated to be materially affected by the good faith or fraud of the seller. In cases of breach of warranty, untainted by bad faith, the measure of recovery is limited to compensation for the natural and proximate consequence of the failure of the commodity sold to come up to the warranty, uninfluenced by adventitious circumstances, and can only include the consequences which were reasonably within the contemplation of the parties when they made the contract. In the present case, if there was no fraud or bad faith in the sale, the proper measure of damages is the difference between the value of the safe as it was, and what it would have been worth if it had been as represented. This alone is the natural, proximate consequence of the breach; this alone can reasonably be presumed to have been within the contemplation of the contracting parties. To go beyond this, would be to give to a contract of warranty all the attributes of a contract of insurance. The two contracts are very different in their scope and obligations, and contemplate very different consequences from their breach. The *visi prius* case of *Sanborn v. Herring*, reported in Amer. Law Reps. N. S. page 457, presented very nearly the same controverted questions, and the same conflict of testimony as are found in this record. The case resulted in a verdict for the defendant, doubtless on a failure of the jury to find fraud or bad faith in the seller. The very similar case of *Walker v. Milner* was tried in London, about the same time, before Lord Ch. J. Cockburn, but we have no access to a report of that case.

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In an able note to the American case, reviewing both trials, is the following language: "An undertaking against all possible force and skill of all future burglars, is so much more like a contract of insurance than one of warranty, that we doubt whether such an undertaking would ever be held by the courts to be created by general words of warranty. A warranty has reference generally to the character and qualities of the thing warranted, not to the acts of third persons. But a contract of insurance does provide against perils of robbers as well as perils of the elements. A contract of insurance, however, implies a premium paid for the risk assumed, in proportion to the amount of the risk, and also a fixed term of insurance. All these elements were wanting in the contracts of warranty set up in the cases before us. There is great force, however, in the position that a manufacturer who sells a safe, as a fire-proof or burglar-proof safe, thereby represents that its securities against fire or burglary are as complete as the experience of those engaged in the business can make them. But it also follows that as soon as the warranty is construed as one, not of absolute, but only of comparative security, then the manufacturer is let in to show that the purchaser can only ask as much security as he is willing to pay for.

In the English case, there does not appear to have been any point raised as to the measure of damages. Both court and counsel seem to have assumed that if the plaintiff was entitled to recover, he was entitled to recover the value of his lost property—6,000 l. This point, however, would appear to have been sharply contested in the case in New York, and the plaintiff's counsel did not claim that he was entitled to anything more than the difference between the value of the safe purchased and that of such a safe as the representations entitled him to, unless the jury found a fraudulent warranty by defendants.

The general rule is, that the parties are deemed to contemplate such damages as the creditor may suffer from the non-performance of the obligation *in respect to the particular thing* which is the object of it, and not such as arise collaterally. The damages may be enhanced, it is true, where the conduct of the party in fault has been fraudulent, where property has been sold for a particular use, and in other cases, but we know of no case where, for a breach of warranty, damages have been held recoverable, so far in excess of the amount involved in the original transaction, as the damages claimed in these actions."

The fraud which would justify a recovery in this case com-
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mensurate with the value of the goods lost from the safe, would not be the mere assertion that the safe was burglar proof, or, would resist the assaults of burglars for any specified time. That may have been the expression of an opinion honestly entertained. Integrity of purpose and fraud do not co-exist. Bad faith is necessary to maintain the claim to the larger damages. To make good this feature of the claim, there must have been an assertion as fact of that which the seller knew to be false, or a reckless, false affirmation that the safe was burglar proof, when the seller did not know whether the assertion was true or not, or, a knowledge on the part of the seller that the safe was not burglar proof, and a failure to communicate that knowledge, when he knew the purchaser was contracting for the safe as burglar proof; and the purchaser must have trusted these representations, and been misled by them. One of these categories must be shown, to entitle the plaintiff to the larger damages claimed.

The sale in this case was made by an agent, and the suit is against his principal. We have above laid down the rules for determining whether the act of the agent in this case is the act of the principal. Even if it should be shown that the agent was authorized to warrant the safe as burglar proof, this would not conclude the principal, unless one of the forms of fraud above described can be carried home to the principal, thus making him a guilty participant in Stewart's fraud, or, unless it be shown that the principal, with a knowledge of the fraud perpetrated by the agent, received and retained the fruits of such fraudulent sale. Anything short of this will leave the liability to account on the agent alone.

The first and second counts of the complaint are sufficient, for they charge on the defendants themselves, knowing an intentional misrepresentation in making the sale, that the safe would resist for twelve or twenty-four hours the most skillful attempts of burglars to enter it. The third count has the further defect that it fails to connect appellants with the alleged fraud of the agent.

Reversed and remanded.

[Stern v. Simpson & Johnson.]

Stern v. Simpson & Johnson.*Detinue for Cotton.*

1. *Mortgage of crop not planted; effect of subsequent delivery under.*—Although a mortgage purporting to convey crops not planted, may be a mere executory contract, yet if the mortgagor, after the crops have been grown, delivers them to the mortgagee in execution of contract, he is thereby clothed with the legal title as fully as if the crops were in existence at the execution of the mortgage, and the title thus acquired will prevail over that of a subsequent mortgagee.

2. *Lien for advances; statutes conferring, construed.*—Although the lien for advances has priority over all liens, except that of the landlord for rent, when created and enforced according to the statute, yet such lien creates no right of property or possession, in the party enforcing it by attachment, and the party raising the crop may transfer it freely, but such transfer is subordinate to the lien.

3. *Same.*—Such lien is a mere charge, or incumbrance, and the claimant of it can not support trespass, trover or detinue. The statute prescribes the remedy for its enforcement, by attachment to be levied on the crop, and such remedy is exclusive.

APPEAL from Eufaula City Court.**Tried before Hon. ALPHEUS BAKER.**

This was an action of detinue, brought by the appellant, Mina Stern, against the appellees, Simpson & Johnson, to recover the possession of a certain bale of cotton. It was shown that the cotton in question was raised by one Tall Jones, in the year 1877, on a plantation cultivated by him in Barbour county; that the said Jones had, on the 27th of January, 1877, executed and delivered to the agent of plaintiff a mortgage on certain lands and four bales of cotton, and that he had delivered the bale of cotton sued for to the plaintiff's agent while the cotton was in the seed; that the cotton had been taken to a gin, and, according to orders of the plaintiff's agent, had been turned over to one Pleasant Jones for the purpose of carrying to the store of plaintiff, and that while said cotton was in the possession of said Pleasant Jones it was taken from him by one W. H. Harrell, as the agent of one J. H. Reeves, who claimed the cotton under a lien for advances; that the cotton was deposited by the said Harrell in the warehouse of the appellees, as the property of Reeves. It was shown that no attachment or other legal means had been resorted to by said Reeves to obtain the possession of said cotton. The instrument purporting to be a lien for advances to Reeves, was also introduced in evidence. This was all the evidence, and the plaintiff requested the court to

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charge the jury that if they believed the evidence, they must find for the plaintiff. This charge the court refused to give, and the plaintiff duly excepted.

JOHN D. ROQUEMORE, for appellant.—Even if it be admitted that the instrument executed by Jones gave to Reeves a statutory lien for advances, it does not follow that the plaintiff should not recover. The lien is the creature of the statute, capable of existing and of being enforced only under the conditions and in the manner declared by the statute. It confers neither property nor the right of property, and can be made available only in the mode prescribed. The delivery of the cotton to the plaintiff, clothed her with the legal title and the right of possession, and the tortious taking of the cotton from her agent gave her a right to maintain detinue for its recovery. If the cotton in her hands was subject to the lien of Reeves, the proper course for him to pursue was to proceed by attachment, to subject it to his lien. He can not seize and hold in defiance of a legal title and right of possession, though the legal title be subordinate to his lien. The statute has defined his remedy in such a case, and that remedy is exclusive.

G. L. COMER, *contra*. No brief for appellees came to the Reporter's hands.

BRICKELL, C. J.—The mortgage to the appellant, so far as it purported to convey the crops of the mortgagor, not planted, but to be subsequently planted, may have been a mere executory contract. Yet, the crops having been grown, gathered, and delivered to the mortgagee in execution of the contract, he was thereby clothed with a legal title to them, as fully as if they had been in existence, and the subject of grant, when the mortgage was executed.—*Bryan v. Smith*, 22 Ala. 534; *Abraham v. Carter*, 53 Ala. 8. The title thus acquired will prevail over that of the appellee, dependent on a subsequent mortgage. But the argument is, that the subsequent mortgage to the appellee, is a crop lien, under the statutes, and has precedence over all prior mortgages, and all prior liens, except that of the landlord for the rent of the premises on which the crop is grown. Such is, doubtless, the operation of the statute, as has been repeatedly declared by judicial decision. The statute does not, however, change the right of property, or the right of possession—these remain as they may be, when the lien is created. It confers on the party making advances to enable another to make the crop, when the facts concur expressed in the statute, and

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these facts are expressed in a written instrument which is duly recorded, a right to charge the crop with the payment of such advances, in priority of all other rights or liens, than that of the landlord for rent. The lien is to be enforced through the medium of an attachment against the crop, and is of the nature and character of the lien of an execution. Until the attachment is issued and levied, the right of property or of possession is not changed—and then it is changed, and to the officer levying the attachment, not to the party in whose favor it issues, the possession is transferred, and a special property so far as is necessary to preserve the lien and to protect the possession. The general property, even then, remains in the party raising the crop, unless he has transferred it, and it may be freely transferred, the transfer being subordinate to the lien. The lien holder can not take the crop from the possession of the party raising it, or from the possession of another, to whom it has been transferred.

A defendant in detinue may plead in justification, that the goods were pawned to him for a debt which is unpaid, or that he has a lien thereon. This is true of liens at common law, of which possession was an indispensable element, which created a special property, and which were lost if the possession was parted with voluntarily. The lien was indeed a right to retain possession, until a debt, or demand, or charge was satisfied, as in the case of an inn-keeper, or a carrier, or artificer, or factor, or pawnee. The lien on a crop for advances, created by the statute, is like the lien of a landlord for rent, or of a judgment, or execution creditor, or of an attachment. It is a mere charge, or incumbrance, when there is neither *jus in re*, nor *jus ad rem*, nor possession or a right to possession.—*Peck v. Jenness*, 7 How. 612; *Thompson v. Spinks*, 12 Ala. 155; *Dulany v. Dickerson*, *Ib.* 601; *Hussey v. Peebles*, 53 Ala. 432; *Treadway v. Treadway*, 56 Ala. 390. Not conferring a right of property, or a right of possession, the claimant of it can not support trespass, trover, or detinue for an injury to, or for the conversion, or for the detention of the crop. The statute prescribes the remedy he must pursue, an attachment against and to be levied on the crop.

When the cotton was delivered to the appellant by the mortgagor, she was, as we have said, clothed with the legal title, in addition to the actual possession. Reeves may have had a lien, to which, by force of the statute, the legal title was subordinate. But the lien did not authorize him to take possession of the cotton, or to detain it from the appellant. It could not, therefore, be pleaded in justification of the wrongful taking and detention—the remedy for its enforce-

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ment prescribed by the statute ought to have been pursued. A judgment, or execution creditor, having a lien on property, could as well be justified in taking it from the possession of the debtor, or of one to whom the debtor had transferred it, as could Reeves be justified for his seizure and detention of the cotton. The court should, therefore, have instructed the jury as requested—that if they believed the evidence, the appellant was entitled to recover. It is not necessary to consider the other assignments of error.

Reversed and remanded.

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Indictment for Selling Liquor to Person of Known Intemperate Habits.

1. *Penal laws; how construed.*—Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature; nor is the maxim to be so applied as to exclude from the operation of the statute, cases which the words in their ordinary acceptation, or in the sense in which the legislature obviously used them, would comprehend.

2. *Code of 1876; § 4205 construed.*—Section 4205 of Code of 1876, when construed in connection with the common law, embraces one who procures the act denounced by it to be done, although he may not *actually* commit the offense. It is enough that he be present, procuring or counseling, aiding or abetting, the person who actually delivers the liquor to one of the prohibited class.

3. *Same; what act within.*—A bar-keeper who sells liquor to a third person, with a knowledge that a person of known intemperate habits is to join in the drinking of it, and permits such intemperate to drink such liquor in his bar, or in his presence, is as guilty of the offense denounced by § 4205 of the Code of 1876, as if he had personally sold and delivered the liquor to such intemperate person.

4. *Charge; what erroneous.*—Under an indictment for the offense denounced by section 4205 of the Code of 1876, a charge which is so worded as to require the acquittal of the defendant, if he did not sell, or intend to sell, to a person of known intemperate habits, though he may have aided and abetted the giving of the liquor to him, is erroneous.

5. *Sentence; what valid.*—The court disapproves the practice of sentencing persons to hard labor to pay the fine and costs, without specifying the amount of the fine and costs or number of days of labor; but the sentence is not invalid on that account.

APPEAL from Elmore Circuit Court.

Tried before Hon. JAMES Q. SMITH.

The appellant, George Walton, was convicted of selling spirituous liquors to one George W. Butler, a person of known intemperate habits. Butler, as a witness for the State,

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testified that the defendant had never sold any liquor to him personally; that he had on several occasions applied to defendant to purchase liquor, which the defendant had positively refused to sell him, stating as a reason that his employer had forbidden him to sell him (Butler) any liquor. This witness further testified that, within twelve months of the finding of the indictment in this cause, he went into the bar-room of defendant with another person; that said person asked the defendant for liquor; that the defendant set the bottle of liquor out on the counter to Butler and said person, who both drank of it, the other person paying for said liquor; that the drinking was done at the bar of defendant and in his presence. There was a conflict of testimony as to whether the said Butler was a person of known intemperate habits. This was all the evidence in the case, and the defendant asked the following written charges:

1st. That the jury must believe from the evidence, beyond all reasonable doubt, that George Walton did actually sell or give liquor to Butler, and that he knew at the time that Butler was a man of known intemperate habits, before they can find him guilty."

2d. "That if the jury believe from the evidence, that the defendant sold the liquor to a third person and the third person gave it to Butler, then they must find the defendant not guilty."

3d. "A bar-keeper has no right to dictate to a purchaser of liquors at his bar, how the purchaser shall dispose of the liquor so bought of him, and if the purchaser calls up a person of known intemperate habits to drink with him, the bar-keeper has not violated the provisions of the statute forbidding the selling or giving away of intoxicating liquors to persons of known intemperate habits."

4th. "That the jury must believe from the evidence, beyond a reasonable doubt, that Butler was a man of known intemperate habits, and that this fact was brought home to the defendant, and that after this knowledge he sold liquors to Butler as charged in the indictment, before they can find the defendant guilty."

The court refused to give any of these charges, and the defendant separately excepted. The jury found the appellant guilty and assessed a fine of one hundred dollars, and the court sentenced him to thirty days hard labor for the fine, and "to additional hard labor until the costs are paid." From this judgment the defendant appeals, and assigns as error the various rulings to which exceptions were reserved.

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W. P. GADDIS and THOS. H. WATTS, Sr., for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—The offense charged against the appellant is *malum prohibitum*; it is created and defined by statute. Statutes imposing penalties, or which create offenses, and declare the punishment which must follow conviction, are strictly construed. This rule, it was said by MARSHALL, C. J., in *United States v. Willberger*, 5 Wheat. 76, is not much less old than construction itself; and “is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment.” Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislative; nor is the maxim to be so applied as to exclude from the operation of the statute, cases which the words in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. In *Huffman v. State*, 29 Ala. 44, this court said: “While we disclaim the right to extend a criminal statute to cases out of its letter, yet we hold it to be our duty to apply it to every case clearly within the cause or mischief of making it, when *its words* are broad enough to embrace such case.”

The statute on which the indictment is founded (Code of 1876, § 4205,) declares, “any person, whether with or without a license, who shall sell or give away spirituous, vinous, or malt liquors, in any quantity whatever, to minors, or persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is guilty of a misdemeanor,” &c. It is silent as to persons who may aid, abet, counsel, encourage or procure the selling or giving of such liquors to the persons of the prohibited class. Statutes, civil and criminal, are necessarily construed in connection with the common law, and the words may contract or expand according to the acceptation they bear in the common law. The rule of the common law is, that in all crimes, under the degree of felony, there are no accessories either before or after the fact; but all persons concerned therein, if guilty at all, are principals.—4 Black. 36. When a statute makes the thing done a misdemeanor, persons who procure it to be done, though not present, are considered as, in contemplation of law, actually doing it.—Bish. Stat. Crimes, § 176. The general rule, that all present at the time of committing

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an offense are principals, although one only acts, if they are confederates, and engaged in a common design of which the offense is part, applies to offenses by statute as well as at common law.—1 Russ. Crimes, 27. The procurer and counsellor, the aider and abettor are, in the light of the common law, principals, doing the criminal act equally with him whose hand performs it, and may be indicted jointly with him, or severally. When the statute is read and construed in connection with the common law, they are comprehended within its terms, and to exclude them would narrow the just meaning of the words, circumscribing the operation of the statute, and leaving room for *subtle inventions and evasions*, to continue the mischief it is designed to suppress. However improper or immoral may be the conduct of a man, though it may manifest an indifference whether the law and social duty are regarded and kept, or violated, it is not this impropriety or indifference which will involve him in the guilt of another who may do a criminal act. There must be participation in the evil design, and his acts must be such as directly and immediately, if not necessarily, leads to the commission of the offense.—4 Black. 34, n. 2; *Rockway v. People*, 2 Hill (N Y.) 558.

There was evidence, properly submitted to the jury without objection on the part of the appellant to its admissibility, having a tendency to prove that he sold the liquor with a knowledge that Butler was to join in drinking it, though another was the purchaser and gave it to Butler. The sale and gift to Butler was a continuous transaction. Before the transaction Butler had more than once applied to the appellant to purchase liquor, and because of his intemperate habits the appellant had refused to give or to sell to him. If Butler's intemperate habits were known to the purchaser, without violating the statute, he could not have given him the liquor. Whether the appellant participated in his criminal design and act, and by such participation became with him a principal, was a question of fact for the jury. It was not necessary that he should, in the language of one of the instructions, have *actually* sold or given to Butler. It is enough that intending that Butler should have the use of the liquor, he sold to another to be given him. Nor is it true that a vendor of liquors has no right to *dictate* to a purchaser how he shall use liquors purchased at his bar. It is not only his right but his duty, to see that in his bar, and in his presence, such liquors are not given to persons of the class to whom the statute interdicts a sale or gift. The fourth instruction would have authorized an acquittal of the appellant, if he did not sell or intend to sell to Butler, though he

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may have aided and abetted the giving of the liquor to him, and for that, if no other reason, was properly refused. The case of *Young v. State*, 58 Ala. 358, to which we are referred, is obviously different from the present case. There an agent purchased liquor for his principal, a person of known intemperate habits, and as he was the mere agent of the purchaser, and the statute is not directed against the purchaser, but the seller or giver, it was held he was not within the words. But it was said, if he had been known to the seller as the mere agent of the person of known intemperate habits, the seller ought to have been indicted.

The sentence of the court is in the form which has been recognized by this court. In my opinion it is irregular, and ought to have specified the amount of the costs, and the number of days of hard labor the appellant should perform in payment of them. The practice has been otherwise and can not be disturbed.—*Walker v. State*, 58 Ala. 393.

The judgment is affirmed.

Whorton, Ex'r, v. Moragne et als.

Settlement of Estate in Probate Court.

1. *Will; construed.*—A died leaving a will which contains the following clause: "Whereas I have heretofore given to my sons B. B. Whorton and J. M. Whorton, and to my daughters Louisa, (Mary Moragne heirs, eighteen hundred dollars only,) property worth, in my estimation, two thousand dollars each. Now I will and devise that my wife Elizabeth pay to each of my other children the said amount of two thousand dollars each, as they become of age or marry, and to the heirs of Mary Moragne two hundred dollars to make them equal. And I further will and bequeath any property remaining after the decease of my wife, of all kinds and descriptions, to be equally divided between my children, share and share, equal and alike." Appellant and the widow of testator were appointed and qualified as executors of his will. Soon after his death the whole of his realty, and the bulk of his personalty, passed into the possession and exclusive control of his wife, who retained the same until her death, some fourteen years afterwards, paying off the legacies, charges upon his estate by the will. After her death, the appellant, as surviving executor, took possession of the property, and, under orders of the probate court, sold it for division.

Held: 1. That under this will the wife of the testator took the absolute property in the estate, real and personal.

2. That after the death of the wife, the appellant was without authority to sell the land or personalty; and that orders of sale for division made by the probate court on his application as executor, were invalid, conferring on that court no power to hold him accountable as executor for moneys arising from sales made under such orders.

2. *Settlements of executors; jurisdiction of probate court over.*—As to the settlement of the accounts of an executor, the jurisdiction of the court of probate

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is purely statutory, and in its exercise the court is regarded as an inferior court of limited and statutory, not of general jurisdiction.

3. *Jurisdiction of court; when open to inquiry.*—The jurisdiction of a court over the subject matter, is at all times open to inquiry, either on appeal or when the judgment rendered is collaterally assailed; and no consent, laches, or solicitation of the parties can cure such a defect.

4. *Sale of personal property of decedent; jurisdiction of probate court to order, on application of executor.*—The court of probate has no jurisdiction to order a sale of personal property at the instance of a personal representative, unless the title in him, which devolved upon him at the death of his testator or intestate, still remains in him.

5. *Legacy; assent to by executor, how may be shown.*—The law does not require that the assent of the executor to a legacy be given in any particular form; it may be expressed in words, accompanied by a delivery of the thing bequeathed, or it may be implied from conduct consistent only with an intention to surrender to the legatee the title and control; and where the property devised is allowed by the executors to remain in the undisturbed possession of the legatee, who is also one of the executors for thirteen years, the presumption of assent will be made.

7. *Probate Court; jurisdiction to order sale of lands of decedent for division on application of executor.*—The jurisdiction of the court of probate to order a sale of lands on the application of a personal representative is statutory and limited, and when the ground of jurisdiction is a necessity for a division among heirs or devisees, the condition of the lands as to title must remain the same as it was at the death of the testator or intestate.

7. *Same; when without jurisdiction to make order for sale of lands devised.* Where, by the will, the testator devised his lands and the executors assented to the legacy, the Probate Court is without jurisdiction on the application of the executor to render orders of sale for the purpose of divisions, or to hold the executor responsible for money received from the sale of lands made under such orders.

APPEAL from St Clair Circuit Court.

Tried before Hon. E. J. ROBINSON.

The opinion states the case.

AIKEN & MARTIN, for appellant.

INZER & ELLIS, *contra*.

No briefs came to the Reporter's hands.

BRICKELL, C. J.—This was a proceeding for a final settlement of the accounts and vouchers of the appellant, as surviving executor of the will of William Whorton, deceased. The bequests and devises in the will of the testator, are as follows: "Of the earthly goods of which it pleased Providence to entrust me with, I wish the following disposition to be made, after paying all my just debts, to-wit: Whereas, I have heretofore given to my sons Benjamin B. Whorton, and James Martin Whorton, and to my daughters Louisa, (Mary Moragne heirs, eighteen hundred dollars only,) property worth, in my estimation, two thousand dollars each. Now, I will and devise that my wife, Elizabeth, pay to each of my other

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children, Richard, Pinkney, Elizabeth, and Martin Van Buren, the said amount of two thousand dollars each, as they become of age or marry, and to the heirs of Mary Moragne, two hundred dollars, to make them all equal. And I further will and bequeath any property remaining after the decease of my wife Elizabeth, of all kinds and descriptions, to be equally divided between my said children, Benjamin B., James M., Richard, Pinkney, Martin Van Buren, Louisa, Catherine, (the heirs of Mary Moragne,) and Elizabeth, share and share, equal and alike." The appellant, his brother-in-law, Isaac Green, and Elizabeth, the widow of testator, were nominated and appointed executors and executrix, the appellant and the widow alone qualifying. The testator died, and the will was admitted to probate in 1850, letters testamentary then issuing. The lands, slaves, and the great bulk of the personal property, passed into the exclusive possession of the widow, and remained in her possession until her death in 1863. She paid to Richard, Pinkney, Elizabeth, and Martin Van Buren, as directed by the will, the sum of two thousand dollars each, to equalize them with the children the testator had in his life advanced. She did not pay to the heirs of Mary Moragne the sum of two hundred dollars, as directed by the will. After her death the appellant, as surviving executor, took possession of the lands and the personal property remaining, and obtained from the court of probate orders to sell the same to effect a division and distribution among and between the remaindermen. On this settlement he was charged with the proceeds of such sales, and credits were allowed him for various disbursements from such proceeds. The charges embrace moneys, it is averred, could have been collected by him, with reasonable diligence, as well as moneys actually received, and several items of credit claimed by him were disallowed or materially reduced. A large balance was found in his hands, from which the court decreed that the two hundred dollars the widow was directed to pay the heirs of Mary Moragne, should be paid to them by the appellant, and the remainder was distributed according to the terms of the will. The appellant reserved exceptions to the rulings of the court of probate, which are now assigned as error.

The several constitutions of the State, in the same terms, have imposed on the General Assembly the duty of establishing in each county "a court of probate, for the granting of letters testamentary and of administration, and for orphans' business." The courts in each county exercising this jurisdiction under territorial statutes, at the adoption of the constitution of 1819, known and designated as the

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"orphans court," and the "county court," and the present court of probate succeeding to the jurisdiction under the act of the General Assembly passed at the session of 1849-50, have by virtue of this constitutional provision been esteemed and declared, courts of general jurisdiction as to the particular subject-matter, *the grant of letters testamentary and of administration*. What may be comprehended under the term *orphans' business*, has not been defined with precision by judicial decision.—*Ikelheimer v. Chapman*, 32 Ala. 676; *Gray v. Cruise*, 36 Ala. 559; *Coltart v. Allen*, 40 Ala. 155. In addition to this jurisdiction, derived from the constitution, the court has by statute been invested with jurisdiction, on the application of the executor or administrator, to order sales of personal property, or of real estate, when necessary for the payment of debts, or to effect an equal division between the next of kin, heirs, or devisees. And also, with jurisdiction over the settlement of the accounts and vouchers of executors and administrators, the rendition of decrees against them, which may be enforced by execution against them and the sureties on their official bonds. This jurisdiction is derived wholly from statutes, and in its exercise the court is deemed an inferior court of limited and statutory, not of general jurisdiction. The general principle of the common law in respect to the jurisdiction of courts, has been uniformly, and it may be sometimes too rigorously applied to the records of the court in the exercise of this branch of its jurisdiction, "that nothing be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." Or, as the principle is stated by Bacon: "Inferior courts are bound, in their original creation, to causes arising within such limited jurisdiction; hence it is necessary for them to set forth their authority; for nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged to be so."—2 Bacon Ab. 630. That the court must keep within the bounds of the jurisdiction as it is defined and limited by the statutes conferring it, is axiomatic. The preservation of the right, the ease and quiet of the citizen, the orderly administration of justice, are all promoted "when every thing runs in its right channel according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice."

The jurisdiction of the court of probate to order the sales of the personal and real property on the application of the appellant as executor, and his liability to account therefor in that capacity, in that court, does not appear to have been

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presented directly for the adjudication of the court of probate, nor has it been presented by the arguments of counsel in this court. The rule of practice is, not to notice in civil cases, errors which are not insisted on in argument—they are regarded as waived. So the rule is, not to consider questions which have not been directly presented to the primary court. These rules are not applicable, and can not be applied to an inquiry as to the jurisdiction of the primary court over the subject matter. If the record discloses that the court is without jurisdiction of the subject-matter, that it lies within the cognizance of other tribunals, no consent, solicitation, or laches of the parties, can preclude the inquiry or give validity to the proceedings, or the judgment founded on them. When this jurisdiction exists, whatever of error or irregularity may intervene, the parties are competent to waive, and it is but a just presumption that they intend to waive it, when they do not insist upon it. While the court is within the pale of its jurisdiction, it would be unsafe, and unjust to the parties, for an appellate court to reverse its judgment upon questions which were not presented to it for decision, and which if they had been presented, other facts and circumstances than are shown, it may be could have been shown, which would render the question immaterial. However this may be, such questions have not entered into the judgment, and are not permitted to be raised first on appeal. The inquiry as to the jurisdiction of the court over the subject-matter, is at all times necessarily open, either on error, or when the judgment is collaterally assailed. The affirmance of the judgment by the appellate tribunal could not impart validity to it, if the law had not granted jurisdiction to the primary court; and it would be vain for the court to reverse and remand the cause to a court having no jurisdiction to decide the litigation, to declare and fix the rights of the parties, or to render any judgment which would bind them.

The court of probate is without jurisdiction to order the sale of personal property, at the instance of the personal representative, unless the title to it resides in him. By operation of law, the title of the testator or intestate to personal property, immediately on his death, devolves on his personal representative—the grant of letters testamentary, or of administration, though subsequent in point of time, having relation to his death. It is this property, and this property only, which the court can order sold. Such is the language of the statutes, and such would be necessarily their construction, if the language was less explicit, for it can not be supposed that it was intended the court should order the

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personal representative to sell property, when he was incapable of making title to it. The title may be legal or equitable—it may comprehend the entire, or a merely qualified interest, but there must be a title in the personal representative, derived from the testator or intestate by operation of law and continuing in him.

The personal property sold by the appellant as executor, was bequeathed by the will of the testator either to Mrs. Whorton for life, with remainder to the testator's children on her death, or to her absolutely. The legal title to it devolving on the executor and executrix, the title of the legatee was imperfect, inchoate, until the bequest was assented to by them. When the assent was given, their legal title was divested, and that of the legatee perfected. The law does not require that the assent shall be given in any particular form—it may be expressed in words, accompanied by a delivery of the thing bequeathed, or it may be implied from conduct consistent only with an intention to surrender to the legatee the title and control. For thirteen years the personal property remained in the exclusive possession of Mrs. Whorton, and she discharged all, except the smallest of the pecuniary legacies, she was by the will charged to pay. From these facts the implication of an assent to the bequest must therefore be made.—*Thrasher v. Ingram*, 32 Ala. 645. No other inference is just or reasonable. Whether she had a life estate only, or the absolute unqualified interest, is not material. If the former, the assent to the gift of the life estate enured to the benefit of the remaindermen, perfecting the title of both; and if the latter, her absolute title was perfected.—*Thrasher v. Ingram*, *supra*; *Quacunque via data*; the title of the appellant as executor was divested, and he was without authority over the property. The assent of the personal representative to a bequest is a mere perfecting act, and when once given can not be subsequently revoked or retracted, so as to restore the title the law had devolved upon him. 2 Lomax Ex'rs. 230–243. When, therefore, the court of probate ordered the appellant to make sale of the property, it passed beyond the bounds of its jurisdiction; it ordered the sale of property to which the appellant, as executor, had no title and over which he had in that capacity no authority. The order and sale were, consequently, void; and the proceeds of sales the appellant may have received were not assets, but were moneys held by him for the use of those having the title, if they elected to ratify the sales—an election, which it is scarcely necessary to say could not be manifested in this proceeding, or in the court of probate.

While the general rule is, that an assent to the particular

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gift, is an assent to the gift in remainder, there is an exception, if on the expiration of the particular gift, the executor is charged with the duty of disposing of the thing bequeathed for the benefit of the remaindermen.—2 Lomax Ex'rs, 233. The will directs that, on the death of Mrs. Whorton, the property remaining be equally divided among the testator's children. The duty of making the division is not, however, imposed on the executors, and the direction merely imports the quantum of interest the testator intended the children to take severally. If we could find in the will, the gift of a particular estate, and of a remainder, this direction not imposing a duty on the executors, would not aid the jurisdiction the court of probate has exercised, nor render the appellant accountable as executor, for an administration of the property.—*Almond v. Mason*, 9 Grat. 700; *Frazer v. Beville*, 11 Grat. 9. An administrator or an executor may, by color of his trust, receive money or property to which he is not in his representative capacity entitled; and any claim he may prefer, to retain it, may be devoid of right and justice; the court of probate dealing with him only in respect to assets, the law charges him with the duty of administering, can not hold him accountable for it.—*Smith v. Smith*, 13 Ala. 329; *Ashurst v. Ashurst*, *ib.* 781; *Carter v. Hinkle*, *ib.* 529; *Martin v. Williams*, 18 Ala. 190; *Pettit v. Pettit*, 32 Ala. 288; *Perkins v. Lewis*, 41 Ala. 649. The court of probate consequently erred in assuming to charge the appellant in respect to this property, or crediting him with moneys expended in reference to it.

The jurisdiction of the court of probate to order a sale of lands on the application of the executor or administrator, is statutory and limited. When the ground of jurisdiction is, a necessity for a division or distribution between heirs or devisees, the lands must remain in the same condition as to title, as they were at the death of the testator or intestate.—*McCain v. McCain*, 12 Ala. 510; *Mounger v. Burks*, 17 Ala. 48; *Pettit v. Pettit*, 32 Ala. 288. At the common law the authority and duty of an administrator extended only to personal assets. Lands descended immediately on the death of the ancestor to the heir, who was invested with the title and all its incidents. The title of an executor, if there was no devise of the lands to him, and no power over them conferred by the will of the testator, was also confined to the personal assets. Lands devised passed immediately on the death of the testator to the devisee. These common law principles have been modified in their operation, but not abrogated by the statutes, which confer on the administrator or executor power to rent the lands, or to obtain orders from

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the court of probate for the sale of them, when necessary for the payment of debts, or to effect equality of distribution between the heirs or the devisees. The descent to the heir is not intercepted—he does not trace his title to the lands from or through the personal representative, nor is his right of entry or possession lessened, until the personal representative asserts and exercises the statutory power. And it is only by an assertion and exercise of the power, that the operation and effect of the devise can be interrupted.—*Leavens v. Butler*, 8 Port. 380; *Masterson v. Girard*, 10 Ala. 60; *Chigiziola v. LeBaron*, 21 Ala. 406. If the heir or the devisee enters, it is subject to the exercise by the executor or administrator of the statutory power to rent or sell, when renting or a sale may be necessary for the payment of debts. Whatever may be the necessity, the heir or devisee is entitled to enter and take the rents and profits, until the personal representative asserts and exercises the power, in the mode prescribed by the statutes, or by actual notice to the tenant in possession indicates his purpose to exercise it.—*Masterson v. Girard*, *supra*; *Fry v. Br. Bk. Mobile*, 23 Ala. 771. The statutes confer in general terms on the court of probate, jurisdiction, on the application of the executor or administrator, to order a sale of lands, “when the same can not be equitably divided amongst the heirs or devisees.”—Code of 1875, § 2249. This is a substantial re-enactment of the former statute of 1822, (Clay’s Dig. 224, § 16,) which, as we have seen, was construed not to embrace lands, the title to which did not remain in the same condition it was at the death of the testator or intestate. There are obviously many difficulties, and it would produce much incongruity, if the statute was applied to the sale of an estate in remainder, on the expiration of the particular estate, when the executor was not by the will charged with the power or duty of effecting a division or distribution among the remainder men. The particular estate, and the estate in remainder, constitute in law but one estate. The remainderman is seized of his remainder at the same time that the tenant of the particular estate is possessed of his estate.—4 Kent, 261–2. When the tenant of the particular estate enters, (a sale of the lands for the payment of debts not being necessary,) the authority of the executor over them, or rather the authority he could assert, can not be called into exercise without affecting the unity of the estate. We do not, however, regard that question as now involved. Though the will contains no gift or devise to Mrs. Whorton in express words, the necessary implication from its terms, is that she takes a fee, and an

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unqualified power of disposition, to which a remainder over on her death would be repugnant.

The maxim of the common law is, that the heir at law can be disinherited only by express devise, or by necessary implication. The statutes of distribution, designating with as much certainty who shall succeed to personal property not disposed of by will, as did the common law, who should as heir succeed to the real estate, the maxim is as applicable here to personal as to real property.—*Denson v. Autry*, 21 Ala. 205. The law and the title it confers, must prevail, unless there is a devise or gift taking its place. Another maxim of the common law was, that if there were no words of inheritance or of limitation to a devise, the devisee had a life estate only, unless from the language used or from other parts of the will a plain intention to give a larger estate could be collected. The practical application of this maxim, the courts declared, more often defeated than it executed the intention of the testator. Yet as descent was the general rule of law, and devise the exception, it could not be departed from until it was superseded by legislative enactment. Early in our legislative history it was abrogated by the statute of 1812, (Clay's Dig. 156, § 33,) now forming § 2178 of the Code of 1876, which declares: "Every estate in lands is to be taken as a fee simple, although the words necessary to create an estate of inheritance are not used, unless it clearly appears that a less estate was intended."

Greater liberality of construction of devises and of wills, is necessarily indulged, than of deeds or other instruments which transfer the title to property, real or personal. They are often drawn most unskillfully, in the absence of counsel, and are confused, or loose and inaccurate in expression. So much depends on the words, arrangement, and circumstances of each particular instrument, that it was said more than two centuries ago, *that cases upon wills had no brothers*. The authority of decisions as to the interpretation of wills, so far as they may be applied to the particular instrument, can not, however, be disregarded without unsettling the titles to property. The object of all construction, is to ascertain the intention of the testator, and however inartificially or inaccurately it may be expressed, when ascertained, it must prevail if not inconsistent with the law. It is said by Blackstone, "by a will alone an estate may pass by mere implication, without any express words to direct its course."—2 Black. 381. The spirit rather than the mere letter of the will, the law regards. Not that upon mere conjecture, words can be added which the testator has not used, but from the words actually employed, the general intent may be inferred,

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though it is not particularly expressed. In *Chapman v Brown*, 3 Burr. 1634, it was said by Lord Mansfield, "A court of justice may construe a will, and from what is expressed necessarily imply an intent, not particularly specified in words; but we can not, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will or supply the omissions. If words are rejected or supplied by construction, it must always be in support of the manifest intent. The constant object of construction is to attain the intent; for this purpose words of limitation shall operate as words of purchase; implications shall supply the place of verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest." A devise or bequest, implied from necessity, not a natural necessity, "but so strong a probability, that an intention to the contrary can not be supposed," upon undoubted authority prevailed in two cases. One was a devise, or a bequest, to the heir, or the next of kin of the testator, at the death of A., an estate for life in A. was implied.—1 Jarman on Wills, 435. Another case, was of an indefinite devise, a devise not accompanied with words of inheritance, or of limitation, passing by its terms, in obedience to the maxim we have noticed, only a life estate, yet if the devisee was personally charged with the payment of the debts of the testator, or with the payment of legacies, or with the payment of a specific sum in gross, without regard to the disparity of the sum charged relatively to the value of the land, the devisee had an estate in fee. The reason was, that if he accepted the devise, he stood in the relation of a purchaser, rather than of a mere recipient of the bounty of the testator, and devises, so far as may be, are construed most beneficially for the devisee. "It is clearly settled in a variety of cases," said the Chief Baron, in *Moor v. Dunn*, 2 Bos. & Pall. 249, which is a leading case on this subject, "that if one devise his estate to another, *paying his debts, or he paying his debts, or paying a sum in gross*, a fee must necessarily pass, because as the devisee is to pay the debts or money in all events, and his interest may cease before he is repaid out of the estate, if it be only an estate for life, he may be a loser, which the testator can not be supposed to have intended. The testator is, therefore, deemed to have devised an interest, which will secure the payment of the debts, or sum in gross by the devisee, without the hazard of loss on his part." (See, also, 2 Jarman on Wills, 125; 4 Kent, 640; 6 Green. Cruise, 274-280, and authorities referred to in text and notes.) This doctrine is now of no practical operation here, as the statute

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intervenes when the devise is indefinite, declaring it a fee-simple. The reasons on which it is founded, are nevertheless still of importance, and may control the construction of devises which are vague and uncertain as to the devisee, and the quantum of interest which he takes. There is, as we have said, no express gift or devise to Mrs. Whorton, yet she is personally charged with the payment of pecuniary legacies exceeding six thousand dollars. Though she is nominated an executrix of the will, it is not in the capacity of executrix that she is charged with this burthen and duty. In the application of the common law doctrine, of implying a fee, when the devise was indefinite, because it was burdened with the payment of debts, or legacies, or a specific sum in gross, if the devisee was also appointed executor, the charge was regarded as having relation, not to his duty as executor, but to his character of devisee.—2 Jarman on Wills, 126; *Dalton v. Hewen*, 6 Madd. 9. The intention to charge Mrs. Whorton personally, and not as executrix, with the payment of the legacies, is apparent from the words and the structure of the devise. It must be observed, that executorial duties by the will, are confined to the payment of debts, and though Mrs. Whorton is nominated executrix in conjunction with the appellant and Green as executors, the devise to her is after the payment of debts, and on her alone and personally is the duty of paying the legacies charged. It is impossible to presume that the testator intended to impose on her the charge and duty—a charge and duty imposed for the purpose of securing equality to his children whom he had not advanced, with those whom he had advanced—without devising to her an interest in his estate, which would enable her to answer the charge. If there is a gift or devise to her, and she accepts it, she is bound personally for the payment of these legacies, and the liability would survive her death. They are payable at different times, and on the happening of different events, which could not occur at the same time—the arrival at age, or marriage of his several children. A mere life estate to Mrs. Whorton, would not satisfy the purposes of the will. The devise could result, and would result, to her injury, if she had died after accepting the devise, and before she had realized from the use of the estate enough to satisfy the legacies. When it is necessary to satisfy the purposes of a devise, a fee will be implied.—*Goodlitt v. Edmonds*, 7 Durn. & E. 635. This at last was the foundation of the common law implication of a fee, when the devisee was personally charged in respect to the lands devised. The reason and spirit of the law apply to this devise, and the whole scheme of the will, and the purposes of the testator,

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would be defeated, and Mrs. Whorton stripped of all benefit if it is not construed as passing to her the fee, and not a mere life estate.

It is true generally, that implication is admissible only in the absence of, and not to control an express disposition, whether it is a bequest or a devise.—2 Jarm. Wills, 525. The common law implication of a fee was confined to indefinite devises, and could not enlarge an express estate for life, or an estate tail, whether limited in express terms, or arising constructively by implication from words introducing the devise over.—2 Jarm. on Wills, 126. If there was a mere gift or devise to the next of kin, or to the heir, (and the children of the testator were his next of kin and heirs), at the death of Mrs. Whorton, the law would imply in her a life estate. But that is not the character of the present devise. The gift to the children, is not of the property which remains after the payment of debts, or the death of Mrs. Whorton, but it is of such of that property as may then remain, and obviously such as may remain after she has satisfied the several pecuniary legacies. For the gift is to all the children, and if it was of all the estate Mrs. Whorton took, the purpose of equalizing the children not advanced, with those who had been advanced, would be defeated, if she died before satisfying the legacies. The gift over was intended to operate simply on such of the property as was undisposed of by Mrs. Whorton, at her death, after she had satisfied the legacies, and was not intended to lessen or affect the quality or quantity of interest devised to her. It cannot be doubted that a power of disposition, not in any particular mode, but a general power of disposition, was involved in the devise and gift to Mrs. Whorton. She could by sale, or by mortgage, have raised the moneys to satisfy the legacies. The devise, therefore, so far as this phase of it is concerned, falls within the familiar principle, that a bequest or devise, accompanied with a general power of disposition, carries the absolute and entire property, a less interest not being expressly limited.—*Allen v. White*, 16 Ala. 181; *Flinn v. Davis*, 18 Ala. 132; *Randall v. Shroder*, 20 Ala. 338; *Denson v. Mitchell*, 26 Ala. 360; *Weathers v. Patterson*, 30 Ala. 404; *Alford v. Alford*, 56 Ala. 350. The will became effectual by the death of the testator, and its probate in 1850, before the adoption of the Code of 1852, and is unaffected by any of the provisions of that Code, if these have any bearing on the construction or operation of the will.

We are of the opinion that under the will, Mrs. Whorton had the absolute property in the estate, real and personal. The court of probate was consequently without jurisdiction

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to render the orders of sale, under which the appellant, as executor, made the sales, and is without jurisdiction to hold him accountable for the proceeds of such sales, so far as he may have collected them, or so far as by proper diligence he could have collected them. A liability may rest upon the appellant, but it is not a liability as executor, and it is in that capacity only, the court of probate has jurisdiction to hold him accountable. An examination of the various rulings of the court of probate, to which exceptions were reserved, all of which proceed on the hypothesis of a liability as executor, is unnecessary, and would be improper. The result is, the decree must be reversed, and in obedience to the practice which has been pursued in this court, the cause will be remanded for proceedings in accordance with this opinion.

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Garnishment.

1. *Garnishment ; what not subject to.*—An assignment by the members of an insolvent partnership, to a trustee, of all their property of every kind and description, for the equal benefit of creditors, “except such individual property as may belong to either of the members of the firm, as may be exempt by law,” is not fraudulent in law as to creditors, though there be no schedule of the property reserved ; and property or effects thus held by the trustee, cannot be condemned on garnishment at the suit of a creditor against the trustee.

APPEAL from Pike Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The opinion states the facts.

JOHN D. GARDNER, for appellants.

N. W. GRIFFIN and J. P. HUBBARD, *contra*.

MANNING, J.—This action was begun by attachment of Flournoy & Epping against H. Lyon & Co.; and Griffin & Brock were summoned to answer as garnishees. They denied any and all indebtedness to defendants, but acknowledged, that a deed of assignment had recently been made to them as trustees by H. Lyon & Co. of all their property, credits and effects, for the benefit equally of all their credit-

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ors, and that they, the garnishees, were in possession of some of the personalty so conveyed to them. The deed of assignment is set forth. A motion was made by plaintiffs (appellants here) for a judgment against the garnishees upon their answers; which motion was overruled. Afterwards the garnishees were discharged. Appellants excepted.

Judgment was claimed against the garnishees upon the supposition and contention that the deed of assignment was fraudulent as to creditors and void. It undertakes to convey to the trustees all the property of the grantors of every kind and description, "except such individual property as may belong to either of the members of the firm, as may be exempt by law." Upon this clause chiefly, and because it does not specify what the individual property is which shall thus be exempt, it is insisted that the deed is void.

That instrument is in form and in all its provisions, except the one just quoted, almost identical with the deed which was sustained by this court in *England & Lee v. Reynolds et al.*, (38 Ala. 370), and according to rulings made in other cases here, a clause reserving from such a conveyance, property which is exempt for the owner's use, from execution or sale for the payment of his debts, does not impair the validity of the conveyance. "Certainly," said WALKER, C. J., "outside creditors can not be prejudiced by the exclusion of property which the law places beyond their reach."—*Walshall's Ex'or v. Rives, Battle & Co.*, 34 Ala. 96; *Young v. Dumas*, 39 Ala. 60.

The failure to describe the property and effects conveyed; either in the instrument or in a schedule, does not impair the validity of the assignment.—*Robertson v. Rapelge*, 2 Stew. 86; *Brown v. Lyon*, 17 Ala. 659; *England v. Reynolds, supra*. And the omission of a schedule of the private property of the individual members of the firm, can not be of greater consequence than the omission of such descriptive list of that of the firm. Besides, for aught that appears, excepting the apparel of the individual partners, and other things for personal use, which were exempt from sale for the payment of their debts, all the property in which they had any interest may have been that which belonged to the partnership; and the exclusion only of their exempt private property from the conveyance, perhaps, was designed to show that, conforming to the decision of this court in *Giovanni v. The Bank*, 55 Ala. 305, they did not claim that any of the partnership property was exempt.

We do not perceive on the face of this deed any thing which would justify a court in declaring it to be fraudulent in law. When an instrument expressly devotes, as this does,

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all the property and effects of the failing makers of it, to the payment of all their creditors equally—an act which the law approves—there must be something more than a mere suggestion, unsupported by evidence, that the persons making the assignment may in some manner be improperly benefited by it, to justify a court in pronouncing the assignment void, and taking the property from all the creditors to appropriate it to the payment of one.

There was no error in the ruling of the Circuit Court, and its judgment is affirmed.

State, *ex rel.* Moniac v. Brewer, Auditor.

Application for Mandamus.

1. *Code of 1876, § 596, construed.*—It is the fact of default by a public official, and not its ascertainment by suit, which makes it the duty of the Auditor (Code of 1876, § 596,) to withhold a warrant from such public defaulter for moneys due him by the State; and such default sufficiently appears if shown by the records and books in the Auditor's office.

2. *Same.*—The fact that the default out of which this indebtedness to the State arose, occurred in the discharge of the duties of another and distinct office from that in which the defaulter earned the amount claimed from the State, does not affect the right and duty of the Auditor to withhold the warrant.

3. *Same; conclusiveness of Auditor's action under.*—The withholding by the Auditor of a warrant for money due by the State to an officer, on the ground that he is a public defaulter, to an amount exceeding the amount claimed, is not conclusive of the fact or amount of the default, and amounts to no more than the refusal of an individual to answer a demand against him, because he has a set-off.

4. *Refusal of Auditor to draw warrant; what proper remedy for.*—If the Auditor refuses to draw his warrant for just claims against the State, for the payment of which provision is made by law, *mandamus* is the remedy; and when the refusal is put on the ground that the applicant is a public defaulter, to an amount exceeding the amount claimed, the answer may be controverted, and the default established or disproved; but when the answer sets up such default and the relator demurs, *mandamus* must be denied.

APPEAL from Montgomery City Court.

Tried before Hon. JOHN A. MINNIS.

This was an application by the appellant, D. A. Moniac, for a *mandamus* to compel the appellee, Hon. Willis Brewer, State Auditor, to draw his warrant on the State Treasurer in favor of relator for the amount of fees alleged to be due him as sheriff of Baldwin county. An alternate writ having been issued, the Auditor answered, averring that at the time

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the accounts of Moniac were presented and payment demanded, the said Moniac was and is a public defaulter in a sum largely in excess of the amount due to him, by reason of defaults committed by him as tax collector of Baldwin county, to which office Moniac had been elected after the expiration of his term of office as sheriff. This return of the Auditor was demurred to on the ground, 1. That the return did not show that Moniac was a defaulter as sheriff, and that his default as tax collector could not be set up against a claim as sheriff. 2. That the return did not show that the relator had been judicially ascertained to be a defaulter, and that the averment that he was a defaulter, is the mere averment of a legal conclusion. The city court overruled the demurrer and refused the writ, and Moniac appealed to this court.

GEORGE F. MOORE and CHARLES J. WATSON, for appellants.—There was no allegation in the return that the appellant had been judicially ascertained to be a defaulter. Can the Auditor, by a mere *ex parte* declaration, refuse to draw his warrant for fees due relator? To give the Auditor this power would be to confer on him power to render judgment without a hearing, and pronounce upon rights without opportunity for the opposite party to defend. The default alleged in the answer is as tax collector, the fees claimed and admitted to be due are claimed in the capacity of sheriff. How could a sheriff be a defaulter to the State? He collects no part of the revenue of the State, he keeps no account with the State, he only receives certain fees for certain services. The defaults of one officer can not be visited on another, and this rule is unchanged when the two offices are filled by the same person.—1 Wyoming, 318; 6 American Reports, 754.

H. C. TOMPKINS, Attorney-General, *contra*.—The Auditor is expressly prohibited from drawing his warrant in favor of any defaulter for moneys due him from the State. No judicial ascertainment of the default is necessary; it is enough that the records kept by the Auditor make it appear that the default has been committed. The same opportunity would be given the relator to contest the truth of this averment in this proceeding, as in any other. It can make no difference in what capacity the money is due to the State. It is the fact that money is due the State, not the character of the debtor, which gives the State the right to retain, and no matter in what capacity due, the fact that the person who claims the warrant owes money to the State, is fatal to his right to a warrant.

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BRICKELL, C. J.—It is the duty of the State Auditor to adjust the claims of all persons against the State, where provision for the payment thereof has been made by law. But he is expressly prohibited from giving *any public defaulter* any warrant for moneys due him from the State, except the balance which is due after the application of the amount due from the State to the extinguishment of the debt, interest and damages, if any are given by law, due from such defaulter. Code of 1876, § 596. The purpose of the statute is manifest, and is just and equitable. It is to confer on the State an unqualified right of retaining—of withholding the moneys in the public treasury, appropriated by law to a person who is indebted to the State, in satisfaction of such indebtedness, when such indebtedness arises from the breach of duty while occupying a public office. The right is not so broad as the right of set off, which the statutes confer on individuals, and no officer has any cause to complain that the State is thereby armed with a power of oppressing him. It is not necessary the default should have been ascertained by a suit against the officer. The Auditor, in asserting the right to retain, must act on the information furnished by the books and records of his department. His action is not conclusive. It does not establish that the person claiming the warrant is a defaulter, and that the right to retain claimed by the Auditor exists. The assertion of the default, and of the right of retainer, by the Auditor, has no more force than has the refusal by an individual to answer a demand against him because he has a set off. When he is sued on the demand the set-off must be pleaded, and must be proved, if it is not admitted. The remedy against the Auditor, is by *mandamus*; and his answer or return averring the default and the right to retain may be controverted and the facts put in issue, with the same facility that the fact of set-off when claimed in a suit between individuals may be controverted.—Code of 1876, § 3601. The answer was not in this case controverted, its truth was admitted by the demurrer, and being admitted, if the court had compelled him to draw the warrant in favor of the relator, it would have compelled him to violate the statute. A *mandamus* will lie to compel inferior tribunals, or ministerial officers to perform duties required by law. It will not lie to compel an officer to do that which it would not be lawful for him to do without its mandate.—*State v. Judge*, 15 Ala. 740. In other words, it does not create duties and compel their performance, but it compels the performance of duties the law has created.

The right of the State to retain, and the duty of the Auditor to withhold the warrant, does not depend upon the fact,

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that the moneys due the officer, and his indebtedness to the State, arise from his occupying the same official relation. It is the fact of indebtedness to the State, arising from a breach of official duty, that gives the State the right of retaining any moneys which may be subsequently due the officer of the default, whether due to him in the same official capacity, or in another, or individually.

The judgment is affirmed.

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Appeal from Order refusing Supersedeas.

1. *Confession of judgment for fine; effect of.*—Parties voluntarily confessing judgment with the defendant, for the amount of the fine imposed, on his plea of guilty to a criminal charge, can not raise any question as to the power of the court to impose a fine on conviction of such an offense; the confession is a release of error, and by the confession of judgment for money, the case assumes the form and qualities of a civil suit.

2. *Waiver of exemptions; presumptions as to execution of.*—On appeal from the judgment of a court of general jurisdiction, all presumptions in favor of its right action will be indulged, which are not repelled by the record; hence, where the judgment entry recites that the parties “waived all right of exemption as to personal property under the constitution and statute laws of the State,” it will be presumed, on appeal, that there was a properly executed instrument in writing expressing such waiver.

3. *Same; what necessary to show.*—Whether there must be an actual instrument in writing expressing such waiver, or whether or not the recital of such waiver in the minute entry of the confession of judgment, must not be treated as a contract of waiver, by matter of record, is not decided.

APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellant, Van McDowell, was indicted at the Fall term, 1878, of the Circuit Court of Chambers county, for removing mortgaged property, of the value of sixty dollars. The judgment on his trial recites, that “the defendant came in his own proper person and by attorney and pleads guilty as charged in the indictment, and by consent of the solicitor and of the defendant, and of the parties confessing judgment with him, the judgment will be a fine of one hundred dollars. It is therefore considered that the State of Alabama, for the use of Chambers county, recover of the said Van McDowell, C. C. Hearn and H. P. Fisher (who confessed judgment with him), the said sum of one hundred dollars, the fine heretofore assessed, and the costs in this behalf expended, for which execution may issue. And the said Van McDowell, C. C.

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Hearn and H. P. Fisher, having waived all right of exemption as to personal property under the constitution and statute laws of the State of Alabama, it is further ordered, adjudged and decreed that the clerk of this court endorse the fact of said waiver on any execution which may issue on this judgment for the collection of the same."

Execution was issued on this judgment against all the appellants and was in the hands of the sheriff for collection. The clerk made the following endorsement on the execution: "All legal exemption rights are waived in the judgment upon which this execution issues as to personal property." The appellants petitioned the circuit judge in vacation for a writ of supersedeas, upon the ground that "said endorsement is illegal, unauthorized, and there was no legal authority on which to base it, and that they nor either of them having made a waiver of their personal property for the payment of such judgment, that said endorsement is illegal, void, and without authority." The circuit judge made an order granting the petition upon bond being given, which was done; and the execution was returned into Chambers Circuit Court.

At the next term of Chambers Circuit Court the appellants moved the court to set aside the judgment for the fine and costs, "because said plea only authorized punishment in the penitentiary as a felony, and the court ordered, by consent, a fine of one hundred dollars, the court having no authority, to order any such penalty as a fine on that plea, under the indictment. 2. To quash the execution issued on said judgment, so far as the waiver of exemption on said execution or claim is endorsed by the clerk on the said execution, the said waiver not being in conformity to the law and not binding on them." The court overruled the motion, vacated the supersedeas which had been granted, and ordered "that execution issue on the original judgment, according to the terms of said judgment." From this judgment the defendants appeal to this court.

W. H. BARNES, for appellants.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—"A confession of judgment is in law a release of errors."—Code of 1876, § 3945; Revised Code, § 3504; 2 Brick. Dig. 138-9, §§ 116, 117, 118, 123. In the present case a judgment was voluntarily confessed for money, and the case is thus made to assume the form and quality of a civil suit. It does not avail, to avoid a confessed judgment, that there are no pleadings or process, or that the same are

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irregular. The confession heals all these errors. *Consensus tollet errorem*. Hence we need not and do not inquire whether the Circuit Court, after the plea of guilty in this cause, was authorized to impose a money fine and take confession of judgment. The appellants can not raise the question.

It is recited in the judgment entry, that "the said Van McDowell, C. C. Hearn and H. P. Fisher having waived all right of exemption as to personal property under the constitution and statute laws of the State of Alabama," it was thereupon "further ordered that the clerk of this court endorse the fact of said waiver on any execution which may issue on said judgment for the collection of the same." The appellants here contend that this is not a waiver of exemptions under the constitution and statute, because it is not made by an "instrument in writing."—Constitution of 1875, Art. 10, Sec. 7; Code of 1876, sections 2846 to 2850 inclusive. The question, how far the recitals in judgments by confession bind the parties, has been several times before this court. Intendments in favor of such judgments have always been liberally indulged. In fact, the rule universally observed in this court, in reviewing judgments of courts of general jurisdiction, is, to presume every thing was rightly done in the inferior court, unless the record shows the contrary. In the case of *Bissell v. Camille*, 6 Ala. 503, the suit was commenced by original writ. The evidence of service was an acknowledgment, bearing the partnership signature, Bissell & Camille. The judgment entry was in the following language: "This day came plaintiffs by their attorneys, and the defendants by Joseph P. Saffold, to whom a power of attorney was executed to confess a judgment in this case—which power of attorney is filed with the papers in this cause—confesses a judgment in favor of the plaintiffs," &c. A power of attorney was found in the transcript, purporting to have been executed by the defendants, corresponding with that described in the judgment, subscribed in their firm name, with a seal set opposite. It was objected that it did not appear that the parties were properly before the court. It was conceded that the acknowledgment, without proof of its execution, did not bring the parties into court. This court added, "But in the present case the defendants appeared, and this was sufficient to cure either the want of or defective execution of the writ. * * The execution of the letter of attorney in the firm name, is no objection to the authority which it confers; for, from any thing appearing to the contrary, both the defendants may have been present, and if both did not actually execute it, yet they may have adopted it as their joint act. The judgment would have been more

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technical, if it had specially recited the fact, that the execution of the power of attorney was proved to the court. Yet we think it clearly inferable from the entry that the court had sufficient proof to satisfy the mind on this point. It is certainly the duty of this court to sustain, by all reasonable intendment, the acts of inferior tribunals, and this principle should not be disregarded in the case before us." In the case from which we have quoted, there was no proof recited of the execution of the acknowledgment of service, nor of the execution of the power of attorney to confess judgment. All the recitals on that subject are shown above. Yet this court held the judgment valid against both defendants. Sustaining these views are the following cases: *Caller v. Densen*, Min. 19; *McConnell v. White*, Ib. 112; *Hodges v. Ashurst*, 2 Ala. 301; *Elliott v. Holbrook*, 33 Ala. 659; *Brown v. Little*, 9 Ala. 416.

We do not, in this case, decide whether it is essential to the waiver of exemption of personal property, that there shall be an actual "instrument in writing." Possibly we would hold, if necessary to the decision, that, like a recognizance, the recital in the judgment entry must be treated as a contract by matter of record. But, following the authorities cited above, we presume every thing in favor of the correct ruling of the primary court, which the record does not disprove; and hence, we presume there was executed an instrument in writing, expressing the waiver, if such instrument be necessary. The present record does not inform us whether or not there was such written instrument signed.

Judgment affirmed.

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Garnishment.

1. *Code of 1876; § 3302 construed.*—Under section 3302 of the Code of 1876, the plaintiff in a garnishment suit has the right to contest with a transferee of the judgment debtor, the right to the money sought to be garnished; and when proper proceedings to this end are taken by the garnishing creditor, the garnishee must hold the money until such contest is decided, and any subsequent disposition of it, by him, is at his peril.

2. *Garnishment; what judgment proper in.*—Where the garnishing creditor has taken proper steps to contest with a transferee of the judgment debtor, the right to the fund sought to be subjected to garnishment, and the transferee, after proper notice fails to appear and propound his claim, judgment

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should be rendered against the garnishee for the amount admitted in his answer.

APPEAL from Mobile Circuit Court.

Tried before J. LITTLE SMITH, Esq., Special Judge.

The appellants, Saller Lewin & Co., having obtained a judgment against one B. R. Levy, sued out process of garnishment against the appellees, The Insurance Company of North America. This garnishment was served on the 11th day of March, 1876. This process was returnable on the first Monday in April, 1876, at which time the garnishee failed to answer, and a judgment *nisi* was taken against it. On notice of the judgment by *sci fa.*, J. C. Reese, as agent for the insurance company, filed a written answer on the 25th day of July, 1876. The answer was, in substance, as follows: That the said Levy held a policy, issued by the garnishee, insuring his furniture to the amount of fifteen hundred dollars; that on the 6th day of March, 1876, this furniture was destroyed by fire, and the garnishees became liable under said policy; that on the same day, and a short time after the fire, the garnishee was notified that the policy had been assigned by Levy to one Gabriel Jacobson, and the money due on the policy was subsequently, and after the service of this garnishment, paid to Jacobson.

Motion having been made, the court ordered the garnishee to answer orally, and in obedience to this order, Reese, the agent of the garnishee, appeared and answered orally. This answer was substantially the same as the former one. Soon after this the appellants moved the court for an order to Jacobson to come in and propound his claim to the fund. This order was granted, and Jacobson duly notified, but he refused to appear or take any part in the controversy.

Appellants then filed an affidavit contesting the answer of the garnishee, on the ground that "it is untrue in law." A motion was made by the garnishee to strike this affidavit from the file, on the ground "that no issue of fact is tendered thereby."

On this motion being made, the appellants moved the court to strike out of the affidavit of contest the words "in law," so as to leave the affidavit as tendering an issue in fact, which was refused by the court, and the appellants excepted.

The garnishee then moved the court for its discharge, which the court granted, and the appellants excepted.

The refusal of the motion to amend the affidavit of contest, and the refusal to give judgment against the garnishee, are now assigned as error.

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indebtedness to Levy, and suggested that the funds were claimed by Jacobson. Proper notice was then served on Jacobson to come in and set up his claim to the money in the hands of the garnishee. The test is, did the answer admit an indebtedness to Levy, for which an action of debt or *indebitatus assumpsit* would lie against the garnishee in his favor. If so, judgment against the garnishee ought to have been rendered.—*M. & O. R. R. Co. v. Whitney & Co.*, 39 Ala. 468.

BOYLES, FAITH & CLOUD, *contra*.—The answer is to be treated as if the garnishee had not said anything about having paid over the money.—2 Ala. 179; 4 Ala. 387. The fact that Jacobson was cited and failed to appear gave plaintiff no right to judgment upon the answer.—39 Ala. 468. The answer of the garnishee not being contested, the court did not err in the discharge of the garnishee.—Rev. Code, § 3299.

STONE, J.—We do not propose in this case to consider the sufficiency of the affidavit of contest, the right of plaintiff in garnishment to amend the affidavit by striking out the words “in law,” or the several rulings of the Circuit Court on that phase of the case. It is manifest that from anything appearing in the record, the case was not one that called for or justified a contest of the truth of the garnishee’s oral, or amended answer. We may add, however, that we have detected no error in the rulings of the court in reference to the affidavit of contest.

The answer of the garnishee admitted there was a subsisting contract by policy of insurance, in force on the 6th March, 1876, the date of the fire, by force of which the garnishee became indebted to Levy, the judgment debtor, in the sum of fifteen hundred dollars; purely a money demand, for which a suit in debt, or *indebitatus assumpsit*, would have lain, at the end of the time when, by the terms of the policy, the loss was demandable. The insurance company was notified after the fire, but on the same day, that this claim was transferred by Levy to Jacobson; but the company did not bind itself to pay the money to Jacobson. Five days afterwards, on the 11th, the writ of garnishment was served; and some two months later the insurance company paid the loss in full to Jacobson, as transferee of the claim. This is the substance of the oral, amended answer of the garnishee. The statute, Code of 1876, § 3302, makes provision for just such a case as this. It gives to the judgment creditor—plaintiff in garnishment—the right to contest with the transferee the right to the money. When, in such case, a notice

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is moved for by the plaintiff, and ordered by the court, the proceedings against the garnishee are suspended until the issue is disposed of. In the mean time the garnishee becomes a stake holder, and must hold the money until the result of the contest and trial determines to whom the money shall be paid. If, before the determination of the contest, or its abandonment (the plaintiff in garnishment is not compellable to contest the transferree's right to the money,) the garnishee pays the money to the transferree, he does so at his peril, and does not, in the least, diminish his liability to have the debt condemned in his hands. It does not rest with him to decide whether the transfer is *bona fide*.—*Mobile & Ohio Railroad Co. v. Whitney*, 39 Ala. 468, and authorities cited.

When Jacobson was summoned, it became his duty, if he claimed the money, to come forward and propound his interest, and thus try the right with plaintiff in garnishment. If he failed to do so, we will not say that the garnishee, in a case like the present, would not have the right to use the transferree's name, and thus tender an issue, and test the *bona fides* of the transfer. But, in the trial of such issue, he can assert no higher or better claim than the transferree could have asserted, if the money had remained in the hands of the garnishee. The transferree being summoned, and failing to appear, and no issue being tendered, it becomes the duty of the court to give judgment against the garnishee, on the admitted indebtedness contained in his answer.

Reversed and remanded.

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Indictment for Assault with Intent to Murder.

1. *Plea; rulings of primary court; how must be shown.*—Rulings of the primary court, in ordering a plea in abatement to the indictment to be taken from the file, will not be revised by the appellate court, when the plea itself and the rulings thereon does not appear from the record, or by any minute entry, but are disclosed merely by recitals in the bill of exceptions.

2. *Evidence; what admissible.*—Evidence of assaults and threats by the prisoner, against the prosecutor, on the same evening and prior to the assault for which the prisoner is indicted, is admissible in behalf of the State to show with what intent the last assault was made.

3. *Same.*—It is not error to permit a witness to testify, on the trial of a criminal case, that a person who was with the prisoner, was his tenant, when the matter was not at issue, and arose only incidentally and collaterally.

4. *Same.*—Acts of persons who were present and apparently co-operating

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with the prisoner in his attempt to intercept the prosecutor, on the occasion of the assault, are admissible evidence as part of the *res gestae*, on behalf of the State.

5. *Evidence; what not admissible.*—What the prisoner said to his physician the day after the fight, when the latter came to treat him for the hurts received in the fight, as to what the prisoner had eaten and the medicine he had taken the day before, is not competent evidence in behalf of the accused, on trial of an indictment for the assault.

6. *Same.*—What the prisoner testified in a civil suit, against him by the prosecutor for the assault, is not admissible evidence in the accused's favor, when indicted for the assault.

7.—*Case affirmed.*—The court reaffirms the rulings in *Mooney v. State*, (33 Ala. 419,) as to when, and when not, drunkenness may afford defense against an indictment for assault to commit murder.

APPEAL from Calhoun Circuit Court.

Tried before Hon. W. L. WHITLOCK.

The appellant, Albert H. Ross, was indicted for an assault with intent to murder, committed on one John Yoe. The bill of exceptions recites that "the State moved the court to strike from the files a plea in abatement filed by the defendant at a prior term of the court, which motion the court granted and the defendant excepted." The bill also recites that a demurrer was filed to the indictment which was overruled, but neither plea nor demurrer, or any judgment of the court on either, are to be found elsewhere in the record. John Yoe, as a witness for the State, testified that on the 20th day of February, 1873, the defendant rode up to the gate at the residence of witness, about four miles from Oxford, in Calhoun county, Alabama, and struck witness with a stick and jumped out of his buggy on the witness, when a fight ensued between them, which continued from fifteen to thirty minutes. This witness was then asked by the State, "Whether or not he had seen the defendant on the day the fight above described occurred, previous to the fight, and to state where they met and what occurred," and he testified that on the day of the difficulty, he was returning from Oxford to his residence, and that about one mile from Oxford he met the defendant in the public highway; that witness was on horseback and defendant in his buggy; that when they met, defendant got out of his buggy, advanced towards witness and took hold of the bridle of his horse; that witness struck defendant with a stick on the hand, which caused him to release his hold on the bridle; and that thereupon defendant struck witness with a stick. The defendant objected to this evidence, his objections were overruled, and he excepted. This witness was also permitted, against the objection and exception of defendant, to testify "that witness left the defendant in the road one mile from Oxford, where he had first stopped him, and rode off in the direction of his

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home; that the defendant got into his buggy, turned it around and pursued the witness, passing him at a point on the road near the residence of George Mattison, and that when the witness reached a point on the road near the house of W. T. Yeatman, he then came up with the defendant, who got out of his buggy, cursed the witness and swore that he would whip or kill the witness, and took up a piece of a fence rail and struck witness with it. This witness also testified that he left the defendant in the road where he had assailed him with a fence rail, and rode on towards his home in the ordinary walk of his horse; that the defendant pursued him and passed him near the residence of Peter Mattison, and drove on ahead of witness, calling Jud Smith, a freedman, who was a tenant of the defendant, residing on the public road leading from Oxford to the residence of witness. The defendant objected to the witness testifying that Jud Smith was a tenant of the defendant. The court overruled the objection and admitted the testimony, and the defendant excepted. This witness also testified that when he got near the residence of Jud Smith, he found the defendant out of his buggy, which was standing diagonally across the road; and that Dorinda Smith, wife of Jud Smith, was holding the horse, while defendant and Jud Smith were standing in the road; that witness, apprehending an attack, rode swiftly by the defendant, who cursed him as he passed. The defendant objected to the evidence of the acts of the defendant, Jud and Dorinda Smith, the objection was overruled, and he excepted.

The testimony for the defendant tended to show that, on the morning of the alleged assault, he left his home and went to the town of Oxford, apparently sober and in his right mind, and no change occurred in his condition until about one o'clock of that day; that shortly before that time he took a drink of whisky, and that in a few minutes he became very much excited, talked irrationally, and behaved in a disorderly manner; that while in this condition he met Yoe and attempted to assault him, but was prevented by friends, and was arrested for disorderly conduct by the marshal of the town. Several witnesses who saw defendant after his arrest by the marshal, testified that in their opinion he was drunk.

Dr. Allen, as a witness for the defendant, testified that he was the family physician of the defendant and saw him after his arrest by the marshal, and that in the opinion of witness, defendant was "intoxicated and angry." This witness testified that he had visited defendant, at his home, on the morning after the difficulty with Yoe, and was asked by defendant

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to state what he (defendant) said to him at that time, as to whether or not he had eaten his breakfast or dinner on the previous day, what medicine he had taken, and what he had drank on that day. The State objected to this question, the court sustained the objections, and refused to allow the witness to answer the questions, and defendant excepted. The defendant then proposed to show by Dr. Allen, who had heard the defendant examined in a civil suit brought against him by Yoe for the same assault for which he was indicted, what defendant had testified on that trial as to his condition at the time he made the assault on Yoe. The State objected to this evidence, the court sustained the objection and excluded the testimony, and the defendant excepted.

This was all the evidence, and the court, at the request of the State, gave the following written charges to the jury: 1. Sanity is always presumed by law. And when insanity is set up as a defense, it devolves on the person so setting it up to prove it. 2. If you believe from the evidence that the defendant drank whisky on the day when it is charged that he assaulted Yoe, and from its effects got drunk, but not to a state of unconsciousness, then he was that day responsible for his acts. 3. Mere drunkenness is not insanity, and drunkenness will not excuse criminal conduct, except where it extends so far as to destroy the capacity to distinguish between right and wrong. 5. You may look to the acts and declarations of defendant, and to all the evidence in the case, to ascertain whether he was drunk or insane. 6. You may look to the declarations and conduct of defendant, not only to ascertain whether or not he was insane, and also with what intent he was moved or actuated at the time of the alleged assault. 7. Every question submitted to you in this case may be settled by you on such interpretation of the evidence as you think is right, in your search after the truth of the issue joined. The defendant separately excepted to the giving of each of these charges.

The jury found the defendant guilty of an assault and battery, and assessed a fine of two hundred and fifty dollars, and judgment was entered accordingly. From this judgment the defendant appeals, and assigns the various rulings to which exceptions were reserved as error.

JOHN T. HEFLIN, for appellants.

H. C. TOMPKINS, Attorney-General, *contra*.

MANNING, J.—Although it is recited in the bill of exceptions that there was a demurrer to the indictment, which

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was overruled—and a writing purporting to be a plea in abatement, which was ordered to be taken from the file—there is no such demurrer or plea found in the record, nor any minute entry in respect thereof, showing that the court or judge had made any ruling whatever thereupon. We find no defect in the indictment for which a demurrer would lie; and no question respecting such a plea arises for our consideration.—*Petty v. Dill*, 53 Ala. 641.

The indictment charged appellant with an assault with intent to commit murder. And while the conflict about which Yoe, the prosecutor who was assailed, first testified, was that which took place at or near his house, the previous attacks of appellant upon him during the same evening, which were allowed to be also proved, showed a continuous and persevering determination, by repeated assaults, accompanied by threats, to kill Yoe or otherwise injure him. Evidence of them was admissible to enable the jury to determine whether or not the assault first proved was made with the intent charged in the indictment.

There was no error in permitting the witness to say that the freedman, Jud Smith, who was with defendant when making one of his demonstrations to intercept and assault Mr. Yoe, was a tenant of defendant's. Though this might not be allowable in such a case as *Parker v. Haggerty*, (1 Ala. 632,) cited on behalf of appellant, when a question in issue is whether or not the relation of landlord and tenant existed; in this instance the testimony meant no more than that Jud Smith lived on appellant's land. As such, it was not the statement of a mixed question of law and fact, but of a fact merely. And whether it was described by saying that Smith was a tenant of defendant, or the occupant of his land, could make no difference whatever in a case like this.

Nor was there any error in permitting the acts of Jud Smith and his wife, Dorinda, when in their presence and apparently with the co-operation of Jud, appellant attempted to intercept Yoe on his way home on the occasion of the assault upon him. This was a part of the *res gestae* of the case.

Dr. Allen, the physician of appellant, and introduced as a witness for the latter, saw him on the day of this assault, while under arrest for disorderly conduct, and thought him "intoxicated and angry." There was no objection to his testifying, if asked to do so, his opinion of defendant's sanity; but it does not appear that he expressed or had any other opinion touching that matter than that he was "intoxicated and angry." There was no error in refusing to permit this witness to testify what defendant (Ross) said to him during

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his visit the next day to treat him for the hurts he had received in his conflict with Yoe, about what he had or had not eaten the day before, and what medicines he had taken, with a view of showing by such subsequent statements, that he was not of sound mind on the day before. To let in such posterior statements would enable a defendant, by contrivance, to make evidence for the exoneration of himself from penalties incurred by his criminal violation of law and of the rights of another.

A defendant, prosecuted for such an offense, is not permitted to be a witness on his own behalf. To have allowed Ross to prove by another who was present, what he had himself testified in his own defense, in the civil action brought by Yoe against him for this assault, would have enabled him to do indirectly what the law would not permit to be directly done. Such evidence was properly excluded.

Besides, this testimony of his, proposed to be now reproduced, was not given in a cause to which the State was a party, and in which appellant was subject to cross examination by the State's attorney. And it can not be permitted, that in a suit between individuals, evidence shall be created, perhaps collusively, by which one of the parties shall escape condign punishment by indictment for a breach of the peace of the State.

The charges excepted to, state with reasonable accuracy when, and when not, drunkenness may afford defense against an indictment for an assault with an intent to commit murder. They are not inharmonious with the ruling on this subject in *Mooney v. The State*, 33 Ala. 419. If any explanation or additions would have adapted them better to the circumstances of this case, they should have been asked of the presiding judge, if needed. We do not find any error in the instructions that were given. Appellant was found guilty of assault and battery only.

Let the judgment of the Circuit Court be affirmed.

[Claghorn, Assignee, v. Lingo.]

Claghorn, Assignee, v. Lingo.

Action for Breach of Agreement.

1. *Evidence ; what admissible.*—In an action to recover damages for the breach of an agreement to deliver cotton, in payment of the price of a fertilizer represented to be "Sea Fowl Guano," and greatly beneficial to crops, the defendant, resisting recovery on the ground that the article purchased was not what he ordered and was worthless, may testify as to the manner and effect of his use of it in the cultivation of the crop.

2. *Warranty ; what constitutes.*—A bare representation or assertion of the quality of the thing sold, if so understood and intended by the parties, will amount to a warranty; hence, when there is evidence that such was the intention and understanding of the parties, though there was no express demand for a warranty, a charge that the "purchaser must buy on his own responsibility or ask a warranty," is properly refused, as tending to take away from the jury all consideration of evidence of a warranty voluntarily made or arising out of the circumstances attending the transaction.

3. *Charge ; what properly refused.*—Whether or not written or printed pamphlets "warranted guano to produce beneficial results," is a question of law for the decision of the court, and a charge which submits that question to the jury is properly refused.

APPEAL from Henry Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The appellant, Rufus S. Claghorn, as the assignee of Boit & Co., brought this action against the appellee, Richard B. Lingo, to recover damages for a breach of the following agreement :

"On or before the 1st of November next, I, Richard B. Lingo, the subscriber, of the county of Henry, State of Alabama, promise to pay Boit & McKenzie or order, four hundred pounds of lint cotton, to class low middlings, ginned and neatly packed, and delivered to them or their agent at Ft. Gaines, Ga., or sixty dollars in currency, as I may elect, at maturity of this agreement, for fertilizer furnished me, and this agreement constitutes a lien or mortgage within itself upon said four hundred pounds of cotton, and it is so confessed and understood, and I voluntarily obligate to abide the law of the State for securing payment for fertilizers and supplies furnished, and to carry out in good faith every part of this agreement. (Signed) RICHARD B. LINGO."

It was shown that Boit & Co. were the successors of Boit & McKenzie, and that the appellant was the assignee of the latter firm. It was shown that the firm of Boit & McKenzie had agents near the residence of defendant; that he ap-

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plied to them for "Sea Fowl Guano;" that a commodity purporting to be "Sea Fowl Guano" was delivered by them to defendant, and that he had not paid the money or delivered the cotton according to the agreement. It was also shown that Boit & McKenzie furnished these agents with pamphlets containing certificates recommending "Sea Fowl Guano" as a good, first-class fertilizer, and as up to the standard, which pamphlets were distributed by these agents to the farmers. These agents kept at their place of business a picture in a glass frame, with the "Sea Islands" or banks of Guano, sea fowls, and ships taking the guano, and large letters on the picture "B. D." Below the picture were the words "For sale by Gordon & Stokes, agents." On the upper part of the picture, in letters, were "Sea Fowl Guano." It was shown that these agents gave defendant no express warranty except such as was contained in the pamphlets and advertisement. The testimony of one Boit showed that the fertilizer was manufactured by one Bradley, who lived at or near Boston, Mass.; that Boit & McKenzie purchased of him in large quantities, and had it shipped by vessels to Savannah, Ga., where it was kept stored, and shipped as required, to persons in the interior; that it was the habit of the firm to have all their guano inspected on its arrival in Savannah, Ga., by Dr. A. Means, who was the regularly appointed inspector of the State of Georgia. This witness further testified that all the guano shipped by them to Savannah was a good, first-class article. Dr. Means, the inspector, testified that he inspected several cargoes of guano for Messrs. Boit & McKenzie, which he found to be a good fertilizer, and which was branded as being inspected by him. The defendant, as a witness for himself, testified that he obtained from the local agents of Boit & McKenzie a pamphlet concerning "Sea Fowl Guano," in which it was strongly represented to be a first-class fertilizer, and that it would greatly increase the crops to which it was applied; that the agent represented it to be a first-class fertilizer; that he saw the glass sign with "B. D." on it, and that he was induced by these representations to buy. Witness then offered to state how he had used the guano sent him. The plaintiff objected to this, but the court overruled the objection and allowed the witness to state the mode of application, and the effects produced by the guano, and the plaintiff excepted. This guano, witness further testified had no inspector's brand on the sacks. One Weems, a witness for defendant, also testified that he had examined the crop of defendant, and could see no difference where the guano had been applied.

Upon this evidence, the plaintiff requested the court to

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charge the jury: "1st. Plaintiff asks the court to charge the jury that the law of Alabama is that the purchaser must buy on his own responsibility or ask for a warranty. 5th. That posters, circulars or pamphlets, with certificates attached, are not evidence of a warranty of the guano with which to charge plaintiff, unless they believe from the evidence that in said posters or pamphlets plaintiff expressly warranted the guano to produce beneficial results." These charges the court refused to give, and plaintiff excepted. The court, at the written request of the defendant, gave the following charges: "1st. If the jury believe from the evidence that there was a warranty that the guano was a first-class fertilizer, and the jury also believe from the evidence that the defendant properly applied and used the guano and the same was worthless, then they should find for the defendant. 2d. That if neither Dr. Means nor any other witness has sworn that he inspected the particular lot of guano sold and delivered to this defendant, and the defendant has testified that when he received the bags of guano there was no marks, brands or tags on the bags except the words "Sea Fowl Guano," then the jury are not authorized to find that the guano delivered to the defendant was ever inspected by any one after it left the place of its manufacture in or near Boston. 3d. That if the jury believe from the evidence that the original plaintiffs, by themselves or agents, represented to the defendant the fertilizer for which the note was given, to be "Sea Fowl Guano," or "B. D.," illustrated by pictures, and that the defendant was thereby induced to buy it, and they further believe that the article he received was of no value, then they must find for the defendant. 4th. That if the plaintiff undertook to sell the defendant "Sea Fowl Guano," and the article or stuff delivered to them was not "Sea Fowl Guano," but was some thing else, they must find for defendant."

To the giving of each of these charges the plaintiff separately excepted. The admission of the evidence objected to, the charges given, and the refusal to charge as requested, are now assigned as error.

J. A. CLENDENIN, for appellant.

W. C. OATES, *contra*.

MANNING, J.—We do not think there was any error in permitting testimony on behalf of defendant of the manner and effect of his using in the cultivation of his crops the article in controversy, represented to be sea fowl guano. This

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testimony seemed relevant to the inquiry whether or not the commodity sold to him was the article he had ordered or a different one.

The first charge asked on behalf of plaintiff and refused by the court, was written in terms which might have misled the jury. In view of the character of the controversy, they might have supposed that if defendant did not "*ask* for a warranty," he could not avail himself of a warranty voluntarily given by the person he contracted with, or arising out of the circumstances attending the transaction. It was not error, therefore, to refuse it as written. The rule in this respect is thus set forth in other cases: "To entitle the purchaser to recover for any defect in the quality or soundness of the article or property sold, except under special circumstances, he must prove that the seller warranted the thing sold to be good and sound, or that he concealed or fraudulently misrepresented its qualities." "A bare representation or assertion as to the quality of the property, *if so intended and understood*, by the parties, will amount to a warranty."—*Barnett v. Stanton*, 2 Ala. 184.

There was no error in refusing the charge numbered 5th, asked by plaintiff. It commits it to a jury to determine whether the written or printed articles referred to "warranted the guano to produce beneficial results." To construe such articles is within the province of the judge.

The suit being upon a written contract for the delivery by defendant of a specific quantity of cotton, or a particular sum of money, for the article sold as sea fowl guano, without any common count, there was no error in the charges given by the court and excepted to by plaintiff.

Let the judgment of the Circuit Court be affirmed.

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Indictment for Murder.

1. *Special term of Circuit Court; what order convening must show.*—It is not necessary that an order for holding a special term of court, should recite that the special term was necessary in the opinion of the presiding judge; his order for the special term is, in itself, an affirmation that the special term was necessary.

2. *Same; who may hold.*—A special term ordered by a judge of the circuit, may be held by a judge of another circuit.

3. *Same; what sufficient to show authority for.*—The order for a special term,

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made by the judge in vacation, need not be entered upon the minutes until the court convenes ; and a recital on its records that the special term was held at the place appointed by law, pursuant to an order made by the presiding judge, after notice given as required by law by advertisement in a named paper published in the county, for more than thirty days, sufficiently shows that the special term was called according to law.

4. *Malice ; presumption as to.*—The law implies malice from the intentional unauthorized use of deadly weapons, if there be nothing else in the transaction to repel the implication.

APPEAL from Sumter Circuit Court.

Tried before Hon. G. H. CRAIG.

The appellant, Balaam Grant, was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for eighteen years, for the murder of one Ed. Williams.

From the evidence it appeared that on the day of the killing, the deceased, and several men who lived with him on the Halsell place, were in the road near that place, when a negro named Lee Jones came along, from the direction of the C. M. A. Rogers place, on which he and the defendant lived. Coming up to where the crowd was, he and Ed. Williams soon got into a dispute about some small matter. Lee Jones turned and rode back up the road towards the Rogers place, and as he went off deceased said, "I reckon he has gone off after his company." Deceased and those with him then went back into the quarters, in the enclosure of the Halsell place, and begun a game of marbles. Shortly after this, Lee Jones and the defendant came riding down the road together. When they were seen the game of marbles closed, and those engaged in it sat down on a bench. After Lee Jones and the defendant had passed about thirty yards they stopped, and defendant said to deceased, "I suppose you told Lee he was going back after his company," to which deceased replied "that he had not, and for him to go along to church where he had started ; that he had not started the fuss with him, and he did not want to end it with him." Lee Jones and defendant then rode back, hitched their horses, and came into the yard where deceased and his friends were. Deceased got up and was leaning against the corner of a cabin. Defendant took a peach tree stick or limb about six feet long and as large as a man's arm, that was leaning against the cabin, and approaching deceased, said to him, "God damn you, I am as good a man as you are," to which deceased replied, "I am as good a man as you." Defendant then said, "God damn you, I will kill you," and at the same time struck him with the stick. Deceased fell to the ground and never spoke afterwards ; he was taken into a cabin and died three days afterwards from the effects of the blow.

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It was shown that deceased and defendant had never met before, and were total strangers, and that prior to this time no difficulty or grudge of any kind had existed between them. This was all the evidence in the case, except proof of venue and time of commission of the offense, and the court, at the request of the solicitor, gave the following written charges: "1. If the defendant struck deceased, intentionally and wrongfully, and without just cause or excuse, he struck him maliciously. 2. If the defendant intentionally and wrongfully, and without just cause or excuse, struck the deceased with a stick, the use of which in such manner was likely to produce death or great bodily harm, he is guilty of murder in the second degree, if death resulted from such blow and the act was committed in this county, and before the finding of the indictment, even though he did not intend to kill the deceased." To the giving of these charges the defendant excepted.

The indictment under which the appellant was tried and convicted, was found at a special term of the Circuit Court, which the record recites was called "in pursuance of an order of the Hon. Luther R. Smith, judge of the 7th judicial circuit of said State. Notice given as required by law, by advertising in the Livingston Journal, a newspaper published in said county, for more than thirty days."

The record also recites that Hon. George H. Craig presided at the called term.

SNEDECOR & COCKRELL, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The indictment in the present case was found at a special term of the Circuit Court, and the objection is urged that the record does not sufficiently show such special term was called according to law. The transcript from the records of the Circuit Court recites the time and place of holding the special term, and that it was held "in pursuance of an order of the Hon. L. R. Smith, judge of the 7th judicial circuit of said State—notice given as required by law by advertisement in the Livingston Journal, a newspaper published in said county, for more than thirty days." Hon. L. R. Smith is, and was at the time this special term was called, the presiding judge of the seventh judicial circuit, and that circuit embraced Sumter county. The statute does not require, or contemplate that the order for holding a special term of the Circuit Court shall be spread on the minutes contemporaneously with making of the order. The order is

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not made by the court in session, but by the judge of the circuit. As such judge, in chambers, he has no minutes or records; and hence could not then enter the order on the minutes. When the court convenes pursuant to the order, there is then a court having its records; and then, and not till then, is it necessary to enter the call of record.—Pamph. Acts 1874–5, page 201.

It is not necessary that the record shall recite or affirm that in the opinion of the judge, a special term was necessary. Whether or not it was necessary, is not an assailable or contestible fact. The intention of the legislature was to clothe the circuit judge with large power and discretion, and to constitute him sole judge of the necessity for holding such special term. The order for the special term, is itself an affirmation that in the opinion of the judge it is necessary. *Martin v. Mott*, 12 Wheat. 19; *Vanderhayden v. Young*, 11 Johns. 150; *Stuyvesant v. Mayor, &c.*, 7 Cow. 588.

There is nothing in the objection that the special term was held by Judge Craig instead of Judge Smith, who was judge of the circuit, and as such had called the special term. The jurisdiction of each of said judges was precisely the same, and any circuit judge of the State could lawfully hold the court.—Constitution, Art. 6, Sec. 6.

The exception taken in this case is general to the two charges given at the request of the solicitor. It follows that if either charge is correct, the exception is not well taken. The record informs us it contains all the evidence. It not only fails to show a provocation for the homicide, but shows the defendant was the aggressor throughout. If the deceased had even given the slayer a verbal insult, and the defendant thereupon gave him a blow with an instrument calculated to produce death, and in that way caused his death, this would be murder. Words never reduce a homicide to manslaughter. And the law, from the intentional, unauthorized use of a deadly weapon, if there be nothing else in the transaction, implies malice.—*Hadley v. The State*, 55 Ala. 31; *Judge v. The State*, 58 Ala. 406.

There is no error in the record. Judgment affirmed.

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Polk v. The State.

Indictment for Carrying Concealed Weapons.

1. *Evidence; what admissible.*—The enmity or unfriendliness of a witness, to the person against whom he testified, may be shown to enable the jury the better to determine, in connection with other evidence, what weight should be accorded to the witness; but it is not permissible to prove the details of a quarrel or difficulty which gave rise to the enmity or unfriendliness.

2. *Same.*—Persons observant of, and familiar with the intercourse between others, and conversant with the state of feeling, as shown by their conduct and conversation, may testify as to a fact whether or not enmity or ill feeling existed between them.

3. *Same.*—Evidence of threats against the life of the accused, is always admissible in defense of a prosecution for carrying concealed weapons; the weight to be attached to such threats being matter for the determination of the jury, who must ascertain the real purpose, or what seemed to be the real purpose of the person making the threats or hostile demonstration and the real not feigned sense of insecurity or peril under which the threatened party labored, when the weapon was carried concealed.

4. *Concealed weapons; what justifies carrying.*—The purpose of the statute permitting the weapon to be carried concealed, was to provide precautionary defense against impending peril. It is not every idle threat that will justify the carrying of a concealed weapon; nor will a threat long made, and not attempted to be executed when it might have been, furnish such excuse; nor, on the other hand, is it necessary to bring a party within the exception, that the threat be then and there presently uttered; it is enough that a threat has been made, and stands uncanceled, by after reconciliation, or other evidence of its abandonment.

APPEAL from Hale Circuit Court.

Tried before Hon. LUTHER R. SMITH.

The appellant, Cæsar Polk, was convicted of carrying concealed weapons. On the trial, one David Jones, Jr., as a witness for the State, having testified, that he had seen defendant carrying a concealed pistol, was asked on cross-examination, if there had been a difficulty between witness and defendant, and having testified that a difficulty had occurred between them about a week previous to the time he had seen defendant carry the pistol concealed; witness was then asked if any enmity existed between himself and defendant, and answered that there was none. Several questions relating to the cause and particulars of the difficulty between witness and defendant, were objected to by the solicitor, the objection sustained, and the defendant excepted. Witness was then asked: "Was any difficulty pending between your son Joe and defendant at the time you say you saw the defendant with a pistol? Had there not been, a short time previous to your seeing the pistol as stated, a diffi-

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culty between your son Joe and the defendant, wherein the said Joe drew a doubled barrelled shot-gun upon the defendant, which he was prevented from using by others standing near, and in which he announced his resolution to shoot the defendant whenever he caught him out?" The solicitor objected to each of these questions, his objections were sustained, and the defendant excepted.

One Jack Morris, a witness for the defendant, was asked if to his knowledge, any ill feeling or feud or continuing animosity existed between the State's witness or his son Joe and the defendant, at the time of the carrying of the pistol as testified to. The solicitor objected to the question, his objection was sustained, and the defendant excepted.

THOMAS R. ROULHAC and THOMAS SEAY, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The appellant was indicted under section 4109, Code of 1876, for carrying a pistol concealed about his person.—See section 4809 and form 21. The defense was that the accused had been threatened with, or had just cause to apprehend an attack. The rulings of the court, in rejecting evidence offered in support of this defense, present the questions for our decision. The Circuit Court did not err in excluding evidence of the cause and details of the quarrel and difficulty alleged to have taken place about a week before the alleged offense between the defendant and the witness David Jones, Jr. That evidence was offered for the purpose of showing the feelings entertained by the witness towards the accused; this, on the question of impartiality or credibility of the testimony given by this witness. It is competent to prove enmity or unfriendliness of a witness to a party against whom he testifies, as one method of assailing or weakening the evidence. It does not set the testimony aside. It is received, that the jury may consider it, with the other evidence, in determining what weight they will accord to the testimony thus given by one at enmity with the accused. But, the proveable fact, is the state of the witness' feelings, not the cause of it. That would probably lead to a multiplication of issues, and confusion of the minds of the jurors. This testimony was properly excluded.

Enmity, or ill feeling between parties, is a fact to which a witness may testify, if he knows it. It is generally made manifest by the demeanor and conversation of the parties; and third persons, observant of, and familiar with their intercourse, and the state of their feelings, as shown by their

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conduct and conversation, may testify to it as a fact. It stands in the category of health, sickness, good humor, anger, earnestness, jest.—*McHugh v. The State*, 31 Ala. 317; *Wilkinson v. Mosely*, 30 Ala. 562; 1 Brick. Dig. 875, sections 993, 998, 999, 1007.

The Circuit Court erred in excluding evidence of the alleged previous threat made by Joe, son of David Jones. Its tendency was, if believed, to prove that the defendant had been threatened with an attack, and thus to make out the defense relied on. If the answer had furnished what the question sought to elicit, it would have shown, if believed, that about one week before the accused was seen to conceal a pistol about his person, Joe had attempted to shoot him with a gun; and on being prevented, had threatened defendant that he would shoot him, whenever he caught him out. This would clearly constitute a threat; and, unless something in the manner of its utterance showed it was not intended to be executed; or, unless Joe's after conduct made it manifest that passion had subsided, and, with it, the purpose to carry the threat into execution, the jury would be justified in finding the defendant stood excused for carrying the pistol concealed about his person. The real transaction, the real purpose, or what seemed to be the real purpose of the person making the threat or hostile demonstration, and the real, not feigned sense of insecurity or peril under which the threatened party labored when he carried the concealed weapon, are questions for inquiry by the jury. A recent threat should weigh much more with the jury, than one of older date. So, if after a threat made in anger, the parties become reconciled, or, being together, the threat is neither executed, nor attempted to be executed, when, if the intention still existed, it could be carried into effect, then, it could not be predicated that the accused had been threatened with, or had good reason to apprehend an attack in the meaning of the law. The excuse rests on the idea of self-defense, not aggression. Still the threat may be given in evidence, but it should weigh nothing with the jury, if under the rules given above, it is shown to be a mere pretext, rather than the true reason for carrying the concealed weapon. It is not every idle threat that will excuse the carrying a weapon concealed about the person; nor will a threat, long made, and not attempted to be executed, when it might have been, furnish such excuse. Precautionary defense against impending peril, is what the statute intended to authorize. We think what we have stated above is, in substance, the import of the language employed in *Baker v. The State*, 49 Ala. 350. Being threatened with an attack, or impending threat, implies only

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that a threat must have been made, and stand uncanceled by after reconciliation, or other evidence of its abandonment. It does not mean that, to excuse the carrying of a weapon concealed about the person, the threat must be then and there presently uttered. This, in most cases, would deny to it all value as a defensive precaution.

Reversed and remanded. The prisoner will remain in custody until discharged by due course of law.

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Indictment for Escape.

1. *Demurrer to evidence ; when permissible.*—In civil cases either party may, as matter of right, interpose a demurrer to evidence, in which the opposite party will be compelled to join, if the demurrer is not frivolous ; but the provisions of the Code on that subject, which repeal the common law, so far as inconsistent with them, are limited by their terms to civil cases.

2. *Same ; disapproval of, in criminal causes.*—While the accused in a criminal cause may, by consent, demur to the evidence, the court disapproves as a dangerous practice, the resort by a defendant to a demurrer to the evidence, thereby burdening himself with the rigid technical rule, that he admits every inference or deduction the jury could legally deduce.

3. *Evidence ; what not sufficient to sustain judgment of.*—Where there is no evidence of the venue, a demurrer to the evidence should be sustained ; and a judgment of conviction on such evidence will be reversed.

APPEAL from Hale Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

The appellant, Frank Martin, was tried and convicted of an escape from hard labor, to which he had been sentenced. On the trial, the State introduced the record of his former conviction and sentence, for burglary, to hard labor for the county, for the term of two years and a sufficient length of time, in addition, to pay the costs. The State also introduced the records of the Commissioners' Court, and the clerk of said court, as a witness, to prove that the defendant was turned over to the superintendent of hard labor for the county, one James. The State also introduced a witness, one N. T. James, a son of the superintendent, who testified that he saw the defendant, with other laborers for the county under his father's charge, on the day before the alleged escape, and that he never saw him with them afterwards, although he was with the convicts as a guard thereafter, and that on the day of the escape witness was three miles distant from them, and did not see them on that day. The State here

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rested, and the defendant, by consent, demurred to the evidence; the demurrer was overruled, and the defendant sentenced for double the term of his former conviction. From this judgment and sentence the defendant appeals to this court.

CLARENCE DERRICK, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—A demurrer to evidence, is a declaration of record by the party making it, that he will not proceed further, because the evidence given by his adversary is insufficient to maintain his cause of action, or the matter of his defense, and is analagous to a demurrer in pleading. The effect of it is now declared by the statute, as it had been declared on common law principles by this court in numerous decisions.—1 Brick. Dig. 883, § 1146. The words of the statute are: “The effect of a demurrer to evidence, is an admission by the party demurring, of the truth of the evidence demurred to, and of every inference or conclusion which a jury could legally deduce therefrom; and devolves on the court the determination of the issue of fact, between the parties, as well as the law.”—Code of 1876, § 3104. In civil cases, it is a matter of right in either party to interpose such demurrer, and the refusal of an inferior court to compel a joinder, (the demurrer not being frivolous,) is an error which will work a reversal of the judgment.—*Brandon v. P. & M. Bank*, 1 Stew. 320; *Alexander v. Fitzpatrick*, 4 Port. 405; *Williams v. McConico*, 27 Ala. 572; *Shaw v. White*, 28 Ala. 637. The Code is a revision of the law in respect to such demurrers in civil cases, and operates an abrogation of the common law, so far as is inconsistent with it.—Sedgwick on Cons. & Stat. Law, 365. It is limited, however, by its terms, to civil cases.

It seems to have been a rule at common law, that while neither the crown, nor the accused, could be compelled to join in a demurrer to evidence, yet, by consent, such demurrer could be interposed by the accused.—*Brister v. State*, 26 Ala. 127; *Bryan v. State*, *Ib.* 65; *Doss' case*, 1 Grat. 557; 1 Chit. Cr. Law, 623. In *Bryan v. State*, *supra*, such demurrer was interposed, and a judgment of conviction affirmed upon the ground that there was evidence tending to establish a material ingredient of the offense, and as there was evidence tending to establish the fact, the demurrer was an admission of it. The constitution guarantees, “in all prosecutions by indictment, a speedy public trial, by an impartial jury of the

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county or district in which the offense was committed." The statutes do not authorize the court in any criminal case, except when the defendant pleads guilty, to render judgment against him. When that plea is interposed, the court may cause witnesses to be examined as to the character of the offense.—Code of 1876, §§ 4869–71. In all criminal prosecutions, the guilt of the accused must be fully proved, a preponderance of evidence may turn the scale in a civil case; but in a criminal prosecution, "neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient, unless it generate full belief of the fact, to the exclusion of all reasonable doubt."—3 Green. Ev. § 29. If a demurrer to evidence may be interposed, and has the same effect, in a criminal prosecution, as in a civil case, this wise and humane rule of the criminal law must be reversed. The evidence, instead of being taken most favorably for the accused, must be taken most strongly against him, if he is the demurrant. Against him there may not be a *preponderance* of evidence; it would be enough that there is evidence having a mere tendency to establish a material fact; then the fact, according to *Bryan v. State, supra*, must be taken as admitted. A jury, if the question were submitted to them, with proper instructions from the court, would hesitate to affirm that the mere tendency of the evidence overcomes the presumption of innocence, which shields every prisoner at the bar.

A party accused of a violation of the criminal law, may waive many of the rights and privileges secured to him by the constitution and the common law; but the courts are not inclined to encourage such waivers. These rights and privileges may in some cases seem unreasonable, and seem to afford him undue advantages. No "extremity of inconvenience," will ever excuse a court for invading them.—*Com. v. Lester*, 17 Serg. & Rawls, 164. "*Tutius semper est errare in inquietando, quam in puniendo; ex parte misrecordiae quam ex parte justitiae.*" In no case of conviction, in which the evidence is palpably inconsistent with the reasonable supposition of the innocence of the accused, can the primary court refuse to grant a new trial. Granting it, rests in the discretion of the court, and its refusal is not revisable on error. The discretion is judicial, regulated and controlled by the law, as completely as if its exercise was revisable on error. It is not to be presumed, that in exercising it, any judge would be influenced by the consideration, that a party convicted of crime has no remedy, if he decides against him. Such a consideration would incline him to listen more readily and favorably to the application, and if the verdict is palpa-

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bly against the evidence, to set it aside. A motion for a new trial will secure to a prisoner all the benefits of a demurrer to evidence, and relieve him from its technical disadvantages. The court may also request the jury to find a special verdict, the legal effect of which the court may afterwards determine. Or, if the evidence is wholly insufficient for a conviction, the accused is entitled to require an instruction to the jury, that they are bound to render a verdict of acquittal. It is a dangerous practice for a defendant in a criminal case to resort to a demurrer to evidence, burdening himself with the rigid technical rule, that he admits every inference or deduction the jury could legally deduce. The practice ought not to be encouraged.

A judgment of conviction rendered on such demurrer, can not be sustained, when there is an absence of evidence of any material fact. Venue, proof of the locality of the offense, corresponding with the averment of the indictment, is indispensable to support a judgment of conviction. There is no fact found in the written evidence to which the demurrer was interposed, which reasonably can be accepted as proving the commission of the offense in Hale county. The inconclusiveness of the evidence in other respects, when subjected to the tests to which evidence in all criminal cases, must be subjected, may be passed. For this reason, if no other, the judgment of conviction must be reversed and the cause remanded; the prisoner will remain in custody until discharged by due course of law.

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Garnishment.

1. *Garnishment; claimant in, how must establish claim.*—The claimant of a debt sought to be subjected by garnishment, can not take advantage of irregularities in the process, or avail himself of the rights of others, with which he does not connect himself, though paramount to the claim of the garnishing creditor; but must rely on the strength of his own claim, the burden of establishing it resting on him.

2. *Assignment; what valid.*—The generality of description of property intended to be conveyed by the assignment for the benefit of creditors, does not affect its validity, when, by parol evidence, a definite application of the terms may be made.

3. *Garnishment; what garnishing creditor may show.*—Where the claimant of the fund is entitled only to the individual property of the debtor, the garnishing creditor may show, by parol, that although the debt is evidenced by judgment against the garnishee in favor of the debtor individually, the debt was in fact the property of a partnership, and held by the defendant in trust.

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APPEAL from Greene Circuit Court.

Tried before Hon. LUTHER R. SMITH.

The original suit in this cause was commenced by the appellee, A. S. N. Few, against one Kirksey, and was founded on an indebtedness of Kirksey & Carpenter, a firm of which Kirksey had been a partner, and of which he was then the assignee in liquidation, and a judgment was thereon rendered against Kirksey. Garnishments were issued and served on F. P. Snedecor and W. G. Little, as administrators of the estate of Joseph J. Little, deceased, and on Snedecor & Cockrell. Snedecor and Little, as administrators, answered that a judgment had been obtained against them as such administrators, by Kirksey, on a claim due the firm of Kirksey & Carpenter for a large sum; that the estate of their intestate had been duly declared insolvent, and said judgment certified to the probate court; that a partial distribution of the insolvent estate had been made, and the amount allowed in said claim had been paid to Kirksey; that there were assets in their hands for distribution, in which Kirksey would be entitled to his ratable share, and at the same time suggested that the appellants, Clarke & Coleman, claimed the same as the assignees of said Kirksey.

Snedecor & Cockrell answered that, as attorneys, they held certain claims which belonged to Kirksey & Carpenter, and set up a similar claim by the appellants.

The claimants objected to so much of the answer of the garnishees as asserted that the funds in their hands belonged to the late firm of Kirksey & Carpenter and not to Kirksey individually, because they were illegal and irrelevant; in this, that Few, by his suit and judgment against said Kirksey on an account against Kirksey & Carpenter, had elected to make and had made said account and judgment the several and individual liability of said Kirksey; but the court overruled the said objections to each of said answers and allowed them to be read in evidence, and the claimants excepted. The plaintiff also introduced in evidence the record of the allowance of the claim against the insolvent estate of Joseph J. Little, deceased, which recites that the judgment in favor of Kirksey, on which the claim was based, "was shown by the record and files, and by parol proof, to have been founded on an account in favor of the late firm of Kirksey & Carpenter against the estate of Joseph J. Little," and "that the claim is allowed in favor of Kirksey as assets of said firm." To this evidence the claimant objected, but the court overruled the objection and admitted the evidence, and the claimant excepted. F. P. Snedecor testified that the late firm of Kirksey & Carpenter did a commission business in Mobile,

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Alabama, and was composed of said Kirksey and one Carpenter, and that said firm failed in the year 1872, and that after such failure, at a meeting of the creditors of said firm, Kirksey was selected as assignee. The judgment in favor of Few originated in this manner: After the death of J. J. Little, in 1872, the crop of cotton raised by him in 1871, was shipped by him as administrator to Kirksey & Carpenter. In this cotton the negro laborers on the place held a third interest, which had not been divided. This claim of the laborers was transferred to Few, in payment of advances made to them by him; and Kirksey & Carpenter had never accounted for the third interest in said cotton, which had been transferred to Few. To the introduction of this evidence the claimants objected, as illegal and irrelevant, but the court overruled the objections and admitted the evidence, and claimant excepted. The claimants based their claim to the funds in controversy on a deed of assignment executed to them by Kirksey. This deed of assignment transfers all the property of Kirksey, of every kind and description, "except so much or such part thereof as is exempt by law from levy and sale under execution, or is exempt as a homestead." Schedules were attached, which recite that they embrace all the property of the assignor "so far as remembered"; and the deed expressly stipulates, "that if by inadvertence or mistake, or otherwise, any of said individual property of the said Foster M. Kirksey shall be omitted from said schedule, said property or effects so omitted are hereby, nevertheless, conveyed and assigned." This was, in substance, all the evidence, and the court, at the request of the plaintiff, charged the jury "that if they believed the evidence, they must find for the plaintiff." To this charge the claimants excepted. There was a verdict and judgment for the plaintiff, and the claimants bring the case here, by appeal, assigning as error the rulings of the court in the admission of evidence and the charge given.

T. W. COLEMAN and ENOCH MORGAN, for appellants.

CHARLES COOK, *contra*.

BRICKELL, C. J.—When a garnishee, by his answer or at any time before a final judgment against him, alleges that he has been notified that a third person claims the title to, or an interest in, the debt he may have admitted to be owing from him, or the property he may have admitted to be in his possession, the court is bound to suspend proceedings against him, and cause notice to be issued to such claimant to appear

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at the next term, and contest with the garnisheeing creditor the right to the debt or property. On his appearance he must be required to propound his claim in writing and under oath, and the creditor must take issue of law, or of fact, thereon. The validity of the claim interposed, must be averred by the claimant and the burden of establishing it rests upon him.—*Scott v. Stallsworth*, 12 Ala. 25; *Camp v. Hutter*, 11 Ala. 151; *Brooks v. Hildreth*, 22 Ala. 469. It may be the demand is not the subject of garnishment, or that third persons, who are strangers to the proceedings, have rights or equities which would prevail over the garnishment. Or, it may be the garnishment is irregular, and if these irregularities were complained of, by the party affected by them, the garnishment could not be sustained. These are matters not involved in the contest between the claimant and the garnisheeing creditor. The garnishment not being void, the claimant can not take advantage of the irregularity, or support his intervention and claim by interposing the rights and equities of strangers, they may be willing to waive; or, whether willing to waive or not, they do not interpose. It is the strength of his own claim, and not the weakness of the creditor's, when compared with some other, which concerns him. What are the rights of the copartner of the judgment debtor Kirksey, or of the creditors of the partnership, to the debt in controversy, is not to be considered. The inquiry is limited to the validity of the assignment, under which the appellants, who were claimants in the court below, deduce title to the debt, and whether that assignment embraces the debt.

The assignment is general, embracing all the individual property of the assignor (the judgment debtor,) not by law exempt from liability for payment of the debts, for the security and payment of his individual debts. The terms of the assignment are very broad, and intended to cover "all the property, real, personal, and mixed," not exempt, of the assignor. Schedules of the property, *so far as remembered*, are annexed, and from part of the assignment, but it is expressly declared: *if by inadvertence, or mistake, or otherwise, any of said individual property of the said Foster M. Kirksey, shall be omitted from said schedule, said property or effects so omitted is nevertheless hereby conveyed and assigned.* The *bona fides* of the assignment is not controverted. The generality of the description of the property intended to be conveyed by the assignment for the benefit of creditors, does not affect its validity, when by the aid of parol evidence, a definite application of the terms may be made.—*Brashear v. West*, 7 Pet. 608; *Robinson v. Rapelje*, 2 Stew. 86; *Pope v.*

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Brandon, Ib. 401; *Tarver v. Rolfe*, 7 Ala. 873; *Brown v. Lyon*, 17 Ala. 638. Though the schedule annexed to the assignment does not embrace the demand sought to be reached by the garnishment—and though it embraces certain choses in action and credits of the assignor, if the demand is the individual property of the assignor, it passes to the claimants. The assignment is not limited and restrained to the property enumerated in the schedules. It is by its terms, and in all its purposes and objects, a *general assignment*, embracing not only the property enumerated in the schedules, but any and all the *individual property* of the assignor, not enumerated, which from any cause may have been omitted from the schedules.—Burrill on Assignment, §§ 134–139.

The point of contention is, whether it was permissible for the garnisheeing creditor to show by parol, that though the judgment stands in the name of Kirksey, as plaintiff, he was but a trustee, and that it was in fact a partnership demand, not passing by, or intended to pass by, the assignment. The assignment operates on the *individual property* of the assignor only—that which could be subjected to the payment of his *individual debts*; not that which he may hold as trustee, nor that which can not, by legal process, be subjected to the payment of such debts—that which is his separate property, as distinguished from that which is partnership property. The conclusiveness of judgments is indisputable. It is certainly true, as between Kirksey and the defendants in the judgment, the judgment conclusively establishes that its amount was legally due to him and not to another. The principle is not infringed by the admission of evidence showing that the claims on which the judgment was founded were due to Kirksey, not individually, but as a trustee for the partnership creditors. Such evidence is not contradictory, but explanatory of the general words of the record, which do not declare whether the claims or the judgment are the individual property of the plaintiff, or held by him in trust. Beside, the principle itself applies only when the controversy is with parties or privies to the record, and does not affect third persons, strangers to the record. The evidence showing Kirksey had and claimed the judgment, not as his individual property, but as a trustee only for the partnership creditors, it was not embraced by the assignment to the appellants. As they had no claim to it, to them it is not material, that if the partnership creditors had intervened, it could not have been subjected by the garnishment. It is the strength of their own title on which they must rely. The rulings of the Circuit Court are not erroneous, and its judgment is affirmed.

[Kimbrough v. The State.]

Kimrough v. The State.

Indictment for Murder.

1. *Jury; what properly organized.*—The fact that one or more of the persons on the *venue* served on a prisoner, charged with a capital offense, were on the regular juries for the week, and could not be obtained as jurors for the prisoner's trial, because then engaged on the trial of another cause, gives the prisoner no right to delay the impaneling of the jury for his own trial, until such persons are discharged as jurors on the other case, or to otherwise delay the trial.

2. *Killing; what cannot be set up to excuse.*—A slayer cannot urge, in his own justification, a necessity produced by his own wrongful and unlawful act, as a valid reason for killing his assailant.

APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellant was indicted for the murder of one Henry Lett, and the list of jurors for his trial, which was duly served on him, contained the regular jurors for the week. In drawing the jury for his trial, the third name and others were those on a regular jury then engaged in the trial of another cause. The judge ordered the names of these jurors, as they were drawn, laid aside, and that others be drawn in their stead. The defendant objected, and insisted that they should be called from the jury room and put upon the parties for acceptance or rejection, which the court refused to do, and defendant excepted. The list served upon the prisoner having been exhausted before a jury for his trial was obtained, and those on the list which were in the jury room not having returned, it was ordered that an additional number be summoned, according to the statute, to complete the jury. To this action the defendant duly excepted.

There was evidence, in this cause, from two witnesses who were present at the killing, to the effect that they were attracted by loud talking, and, on going to the place whence it proceeded, found the deceased and defendant engaged in a controversy about a note. One of these witnesses testified that soon afterward the deceased, in turning or stepping backward, struck his feet against some obstacle, and fell to the ground. When the deceased fell, the defendant rushed upon him, and cut him in the neck with a knife. There was evidence tending to show that this witness had made state-

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ments to the effect that the deceased was stooping to pick up a rock when the defendant cut him.

Another witness for the State, who was a brother of deceased, testified that the defendant, with his left hand against the shoulder and his knee against the thigh of deceased, pushed him backward, when the foot of deceased striking some object, he fell, and, as he was falling, the defendant struck him with a knife in the neck; that witness attempted to arrest the defendant, after the cutting, but defendant cut witness with the knife and ran; that witness followed the defendant a short distance, and threw a rock at him, and returned to his brother, who died almost immediately.

One Joe Smith, a witness for the defendant, testified that he was passing along the road near where the deceased and defendant were standing, some fifteen steps from them; that he heard them quarreling, and heard the deceased say to the defendant, "put up your knife, and fight a fair fight," and heard the defendant say, in reply, "that he would not do it; that his finger was sore, and he could not fight."

After the general charge had been given, the counsel for the defense orally asked the court to instruct the jury, as part of the law of self defense, "that the law does not require a party to retreat before taking life, if by so doing he increases his peril." This charge, the court refused to give; but, instead, instructed the jury that if a person willingly engage in a fight, and, in the fight so willingly engaged in by him, kills his opponent, he cannot invoke the doctrine of self defense to his entire justification—unless it appears that he had done all he could reasonably do to avoid the combat, even to a retreat, though, by so doing, he increased his peril. To this charge, the defendant excepted.

The jury found the defendant guilty of murder in the second degree, and assessed his punishment at forty years' imprisonment in the penitentiary; and judgment was rendered accordingly.

No counsel for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

MANNING, J.—Appellant was charged with the murder of one Henry Lett, and among the persons of the *venue* summoned to compose a jury to try him, of which a list had been duly served, were, as the statute directs, those who belonged to the regular juries of the week; and, in drawing out the names, the third and others were some of these, who

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were then in a room in the court-house engaged, as members of a jury, in the consideration of another criminal case, which had been committed to them, under their oath, to render a true verdict therein. The judge, therefore, ordered their names, as they were respectively drawn, laid aside, and that others be drawn in their stead. To this course, the defendant objected, and insisted that they should be called from the jury room as their names were drawn, and put upon the parties for acceptance or rejection; which being refused, defendant excepted. And the names of all who were originally summoned having been exhausted before the jury was complete, and those who were in the jury room not having yet returned, it was ordered that an additional number be summoned from the bystanders, or others, according to the statute, for the completion of the jury; to which, also, defendant duly reserved an exception. And it is insisted that the objection of defendant should have been allowed, and the business of the court suspended until the jury then out returned into court, and were discharged of the case committed to them.

The constitution gives to the person indicted the right to a trial "by an impartial jury." How this shall be constituted, it is left to the legislature to provide. To this end, it was enacted, among other things, that for the trial of a capital case, there shall be summoned to select from "not less than fifty nor more than one hundred persons, including those summoned on the regular juries for the week."—Code of 1876, § 4874. A list of these is to be delivered to defendant, if he is in confinement, one entire day before the trial.—§ 4872. If the persons summoned as jurors *fail to appear*, or if the panel is exhausted by challenges, neither the defendant nor his counsel is entitled to a list of the persons summoned to supply their places."—§ 4873. "A mistake in the name of any person summoned as a juror for the trial of a capital offense, either in the *venire*, or in the list of jurors delivered to the defendant, is not sufficient to quash the *venire*, or to delay or continue the trial, unless the court, in its discretion, is of the opinion that the ends of justice so require. Others are to be "forthwith summoned to supply their places."—§ 4876. And "any person who appears to the court to be unfit to serve on the jury, may be excused on his own motion, or at the instance of either party."—§ 4885. If all the slips of paper containing the names of those first summoned are drawn, "and the jury *is not made up*, the court must direct the sheriff to summon at least twice the number of jurors required to complete the jury,

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whose names are also to be written on slips of paper, deposited and drawn.”—§ 4878.

These enactments manifest a desire to favor the accused in the circumstances provided for, so far as the due administration of the law will permit, but not to such an extent as “to delay or continue the trial,” or obstruct the business of the court. It is presumable that when the legislature authorized the summoning of “the regular jurors in attendance” among the number, not less than fifty nor more than one hundred, above mentioned, it contemplated that some of those regular jurors might, at some time when their names were called, be engaged in the trial or consideration of another cause, from which they could not, without a violation of law and of the rights of other parties, be discharged or brought into court, or voluntarily come themselves.—1 Bish. Cr. Pr. § 995. See, also, Clark’s Man. of Cr. Law, pp. 450–51. Being thus kept away, the contingency has happened, when other persons should be summoned to supply their places.

Any other construction than this of the statutes would often produce the stoppage, in such conjunctures, of all the important remaining business of the court. For, if it must idly wait until the jury out shall agree on a verdict and bring it in, the term during which the court may lawfully remain in session might expire, or so much of it be wasted that other causes could not be tried, and those interested in them, perhaps innocent persons impatient for a trial, be consequently kept in prison six months longer, until the court shall again be holden. Consequences so oppressive could not have been intended by the legislature; and its enactments should not be so construed as to produce them. It is a case in which the maxim, *argumentum ab inconvenienti plurimum valet*, is applicable.—11 Meeson & W. 928–9; 10 *id.* 434.

The judge did not err in ordering the drawing for jurors to proceed.

Nor was there any error in the refusal to charge, in this case, as requested, or in the charge given which was excepted to.

A slayer cannot urge, in justification, a necessity produced by his own unlawful and wrongful act, as a valid reason why he may lawfully kill his adversary.—*Eiland v. State*, 52 Ala. 332; *Lewis v. State*, 51 Ala. 1; Clark’s Man. of Cr. Law, § 377 *et seq.*, and cases there cited.

Let the judgment of the circuit court be affirmed.

[Ex parte Schmidt & Smith.]

Ex parte Schmidt & Smith.

Mandamus.

1. *Mandamus; when will not lie.*—Mandamus will not lie to correct errors in the final judgments or decrees of an inferior court; and where the injury sought to be redressed consists in the refusal of the lower court to enter proper judgment upon the verdict of a jury, the remedy is by appeal, and not by mandamus.

2. *Code of 1876, § 3440 construed.*—Under section 3440 of the Code of 1876, the husband of a married woman may contract for the erection or repair of buildings situated on lands forming part of her separate estate, and the lien of a mechanic or material man for work done or material furnished in the erection of such building, attaches to the property, without the participation of the wife in the making of the contract.

3. *Judgment; what proper in such a case.*—Where the plea only puts in issue the right of the husband to make the contract under which the work is done, and material furnished, and the jury find a general verdict for the plaintiff, the court should enter judgment declaring a lien and providing for its enforcement. The failure to enter such a judgment, is an error which can be corrected by amendment *nunc pro tunc*.

Application for mandamus to Hon. JAMES Q. SMITH.

This was an application for a mandamus to compel the Circuit Court of Montgomery county, Hon. J. Q. Smith presiding judge, to enter up a proper judgment upon the verdict of a jury, and to vacate and annul the judgment entered. The facts necessary to the decision, are as follows: Schmidt & Smith, the relators, were partners and dealers in building materials in the city of Montgomery. At the request of one David S. Arnold, they did certain work and furnished certain materials in the renovation of a house owned by the wife of said Arnold, as part of her separate estate. The complaint averred that said David, for himself and as the agent of said Caroline, applied to the plaintiffs and purchased certain materials, which were used on said house, and had a large amount of painting done on the same. It further alleges that the said Caroline and David Arnold had entered into and occupied such residence, after said materials were furnished and said work done; that the materials furnished and work done were for the immediate use, benefit and enjoyment of the said Caroline Arnold, and that she is now enjoying the same as a residence for herself and family. The complaint was demurred to on the ground, among others, that it failed to show that Caroline Arnold ever authorized her husband to make the contract with the plaintiff. This

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demurrer was overruled. The defendant, Caroline Arnold, then filed a special plea, setting up that she was a married woman; that the property sought to be condemned was part of her statutory separate estate; that she never authorized her husband to make the contract; that she had never ratified said contract, and then occupied the house by virtue of the wish and command of her husband, and not otherwise. Issue was taken on this plea. The jury returned the following verdict: We, the jury, find for the plaintiffs and assess their damages at one hundred and sixty-seven 65-100 dollars. And upon this verdict the court entered a personal judgment against both defendants. The plaintiffs thereupon moved for a judgment of condemnation against the property of Mrs. Arnold. This motion was refused, and the plaintiff applied to this court for a mandamus to compel the circuit judge to grant the motion.

WATTS & SONS, for the petitioners.—Mandamus is the only means to enforce the rights of the plaintiff. If upon appeal this court should adjudge that the judgment entry in the court below is wrong, the decision would be a reversal of the case as an entirety, and would not serve the purpose or give the relief sought. The verdict of the jury was a finding for the plaintiff as to all the issues joined between the parties, and one of these issues was whether the estate of Caroline Arnold was subject to claim of plaintiffs. As to the effect of the verdict, see 7 Port. 234; 10 Mass. 64; 31 Ala. 200; 33 Ala. 110; 19 Wend. 408. A personal judgment on a suit to enforce a mechanic's lien is erroneous and unwarranted.—Phillips on Mechanic's Liens, 599; 20 N. Y. 249; 36 How. Pr. 73; 4 E. D. Smith, 721. There is no exception in the terms of the statute in favor of married women, and there is none in the nature of the case or in reason, policy or convenience.

F. S. FERGUSON, *contra*.—Mandamus is not the proper mode of correcting the error, if any there be in the action of the court. The judgment rendered is a final judgment, determining the right of the parties, and appeal is the specific remedy. Again, this writ will lie to compel an inferior tribunal to act, but can not control its action or point out how it shall act.—*Lamar v. Comm'rs of Marshall Co.*, 21 Ala. 772. The court below did not err in refusing to enter up a judgment condemning the property of Mrs. Arnold and ordering a sale. In such cases the law is strictly construed and the verdict must be strictly followed.—Phillips on Mech. Liens, § 449; 1 California, 183. The issues submitted to the jury

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were—1st. Indebtedness; 2d. Liability of Mrs. Arnold; 3d. The lien. If the jury failed to respond in their verdict, the court can not supply the omissions. On the verdict they were entitled only to a personal judgment. The evidence failed to show that Mrs. Arnold ever authorized her husband to make the contract, and in the absence of such authority the husband, as such, has no power to do so.—33 Iowa, 224; 26 Iowa, 297; 33 Ver. 457.

STONE, J.—To authorize the issue of the writ of mandamus, there must be a clear legal right, and no other adequate remedy. The writ lies to compel the execution of ministerial duties, in all proper cases. As to judicial functions, the rule is different. The writ will be awarded to compel courts to entertain jurisdiction and pronounce judgment in the premises. It will not be awarded to order or direct what judgment shall be rendered in any given case; nor can its powers be invoked to correct any error in the final judgment or decree of an inferior court. The reason of this latter rule is, that there is an adequate remedy in appeal, which lies from all final judgments or decrees of courts of record.—2 Brick. Dig. 239–40, §§ 2, 3, 4, 6; *State ex rel. v. Bowen*, 6 Ala. 511; *Bridges v. Miller*, 3 Ala. 746; *Ex parte Henry*, 24 Ala. 638; *Ex parte Echols*, 39 Ala. 698; *Ex parte Hendree*, 49 Ala. 360.

In the present case an issue was formed and submitted to a jury, who returned a general verdict for the plaintiffs, assessing damages. Thereupon the court rendered judgment for the plaintiffs, but failed and refused to declare by its judgment a lien for mechanic's work and materials, claimed in the complaint. The court thus pronounced final judgment on the verdict. The claim is that the court did not go far enough, and award to plaintiffs all they were entitled to under the verdict. If this be so, it is simply a case of erroneous judgment, not a failure or refusal to entertain jurisdiction, or to render judgment; at most, an error in the judgment rendered, not an erroneous refusal to adjudge. If the verdict authorized the judgment claimed, then the court's failure to award it was an error in the final judgment. It is difficult, if not impossible, to discriminate between such an error as this and the award of a judgment, larger or more extended than the verdict warrants. Each is the exercise of the judgment of the court over the entire merits of the controversy; the one in awarding too little, the other in awarding too much. For the correction of such an error as this, appeal is the remedy, and mandamus will not lie. The writ of mandamus must be denied, with costs.

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We might rest this case on the point declared above, without further discussion. The question of merit, however, has been very fully and ably argued; and inasmuch as it will come again before us if we leave it undecided, we feel it our duty to announce our conclusions, so that the proper course may be pursued in the court below.

Our present statutory system, defining and declaring liens of mechanics, employes and material men, for buildings, erections, or improvements upon lands, or for repairing the same, are of recent enactment, and their construction, in the main, remains to be settled. Such liens were unknown to the common law, and, hence, are purely of statutory creation. They are to be construed as other statutes, introductive of a new policy, are construed; and while it is not permissible, under the guise of interpretation, to extend the provisions of the enactments to cases not provided for, it is equally unjust and unauthorized to emasculate the statutes by a narrow or strict construction of their beneficial provisions. Their general policy was and is to secure to the artisan and laborer the just reward of his labor, and the lien conferred is somewhat analogous in its aims to the equitable lien of a vendor for unpaid purchase-money of lands sold. It is inequitable, says the law, that one shall enjoy another's lands, and not pay the promised price. So, the policy of the statute we are considering, declares that it is inequitable that one shall enjoy another's goods, or the products of his labor and skill, without making just compensation therefor. The same reason which upholds the policy of the one, vindicates the justice of the other. Our legislative policy for the last thirty years, and the overthrow of private fortunes consequent upon our late civil war, have had the effect to place much of the property of the country in fiduciary hands; and the beneficiaries of many estates, while they could and did enjoy the products of their property, were left without power to fasten a charge upon it by any contract of theirs. This, in many instances, worked great hardship, and inflicted grievous wrong; and our very liberal exemption statutes, in the absence of special waiver, have placed the entire property of much the larger part of our population beyond the reach of legal process. The manifest and deplored result of all this has been, that the honest toil of the laborer, and the merchandise of the material man, have often been appropriated, by a faithlessness, in some cases highly culpable. These considerations, no doubt, influenced the legislature in declaring the very liberal and comprehensive system of liens, now found upon our statute book. It is our duty, in construing these statutes, to give to the language its natural import and

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scope, and thus carry into effect the intention of the legislature, as far as it can be gathered from the language employed.—Phillips on Mechanic's Liens, sections 14 to 18 inclusive.

These liens being of statutory origin, it very naturally followed that, while a general policy pervades them all, great diversities of detail are found in the various legislative systems. The diversities exist alike in the scope of the lien, the conditions of its creation, and the manner of its preservation and enforcement. Hence, what will or will not uphold such lien under one system of statutes, is often a very poor guide in controversies arising under other legislation. Judicial precedent is serviceable in furnishing canons of interpretation, and analogies to aid and direct judicial inquiry; but, when the statutes are essentially different, their assistance extends no further. The inquiry, at last, in all such cases is, what is the legislative will and intent, as expressed in the statute. All the authorities agree that the lien can not be extended beyond the provisions of the statute conferring it, and that there is no limit or restraint on legislative power to create such lien. It is but a mode of securing the payment of a debt.—Phil. on Mech. Liens, §§ 98, 99, 100. The property of persons not *sui juris* may be made subject to such lien; and the legislature may prescribe in what manner the lien may be created. Speaking of the improvement of estates of married women, it has been well said, "This statute ought to receive a liberal construction, and not such a one as would put it out of the power of a husband and wife to improve the property of the wife for their joint benefit. If the wife can not contract for such a purpose, there is a stronger reason than in ordinary cases, why the mechanic should retain a specific lien as a security for the labor bestowed. Disabilities are for the protection of parties incapable of contracting, and should not be converted into instruments of fraud or injustice."—7 Ind. 125.

Our statute is peculiar and very comprehensive. It declares that "every mechanic or other person, who shall do or perform any work or labor upon, or furnish any material," &c., "for any building, erection, or improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor," &c., "shall have for his work or labor done, or materials," &c, furnished, a lien to the extent and in the manner by this chapter provided, upon such building, erection or improvements," &c.—Code of 1876, § 3440. "Every person, including all *cestuis que trust*, for whose immediate use, enjoyment or benefit, any building, erection, or improve-

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ment shall be made, shall be included by the words owner or proprietor thereof, under this chapter, not excepting married women as to their separate property.”—Section 3460. We think this language is so clear as to preclude controversy. The contract which creates the lien, may be made by the owner or proprietor of the property, or his agent or trustee. The husband is, by law, made the trustee of the wife’s separate estate, and, as such trustee, he can, so long as he remains trustee, contract for such building, erection or improvement, without the participation of his wife in the making of the contract. If it be urged that under this large power, he may entail embarrassment and ruin on his wife’s estate, her safety will be found in the authority the statute gives her to have him removed, if he be faithless to the trust. Section 3460 must not be overlooked in this connection. It declares that *cestuis que trust*, even married women as to their separate property, are “included in the words owner or proprietor,” and that they may make such contract, conferring a lien, if the building, erection or improvement be for their immediate use, benefit or enjoyment. We hold, then, that the husband as trustee, so long as he remains such, has a general power to improve his wife’s separate property, by erecting buildings, &c., and that the mechanic, material man, &c., has the statutory lien on the property, if he comply with the terms of the statute. We hold further, that the wife by her own contract for building, improvement, &c., may fasten a lien on her separate property, if the building, erection or improvement be for her immediate use, enjoyment or benefit.

The complaint in the present case is not confessedly framed under either phase of the statute above presented. It does not aver that Mr. Arnold made the contract as trustee, nor that he was trustee. It possibly shows a *prima facie* case of statutory separate estate in Mrs. Arnold, but for aught that appears, some other person may have been her trustee. It does aver that he made the contract as her agent, and that the work was done on the house, and the materials furnished, for the immediate use, benefit and enjoyment of Mrs. Arnold, the wife, “and that she is now enjoying the same as a residence for herself and family.” We think this is a substantial averment that Mrs. Arnold made the contract through her husband as agent, and that the building on which the materials and work were bestowed, were for the immediate use, enjoyment and benefit of Mrs. Arnold. This brings the case directly within the statute; and the complaint being unobjectionable in other respects, it must be adjudged sufficient. The plea puts in issue only a single

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material averment of the complaint; namely, the authority of Mr. Arnold to make the alleged contract as agent of Mrs. Arnold. Every other material averment in the complaint must be treated as admitted. The jury charged with the trial of the issue, had before them, and could consider only, the question of agency *vel non*. The general verdict for the plaintiffs must be treated as a finding that the plaintiffs' averment of agency is true, and the plea false. This leaves nothing to be done except to pronounce judgment. The lien in such case, its extent, and the mode of making it available, are all defined by the statute, and the court should have made the judgment to conform to it. This is an error, however, which the court below can correct, by judgment rendered *nunc pro tunc*.

Hooks v. Brown et al.

Bill in Equity to subject Equitable Separate Estate of Married Woman.

1. *Equitable separate estate; what necessary to create.*—In order to create an equitable separate estate in a married woman, though no particular form of words is necessary, it must appear from the instrument and all the circumstances disclosed in it, that there is a clear and plain intention that the marital rights of the husband shall not attach, and that the wife should hold and enjoy free and independent of them.

2. *Separate estates of married women; statutes concerning, to what relate.*—The statutes concerning the separate estates of married women do not refer to or affect separate estates created by contract, gift, or conveyance for their use, and operate only in estates made separate by operation of law, not limited expressly to the separate use of the wife.

3. *Equitable separate estate; what devise creates.*—A devise to the wife for life, with remainder on her death to her children born of her marriage with her then husband, and which vests the legal title in the husband as trustee, declaring that the property devised shall not be subject to his debts, directing him to appropriate the rents, profits, and interests, *for the use and benefit of his wife and children*, and clothing him with power to sell and convey the lands, whenever he may think it to the advantage and best interest of his wife and children, and to reinvest the proceeds, creates in the wife an equitable separate estate.

4. *Same; power of married woman to bind.*—Unless specially restrained by the instrument creating it, a *feme covert* may bind her equitable separate estate by any contract, to the same extent as if she were a *feme sole*, and a court of equity will subject the property to the satisfaction of any lawful contract she may make.

APPEAL from Sumter Chancery Court.

Heard before Hon. A. W. DILLARD.

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This was a bill filed by the appellees, S. and A. Brown, against the appellant, Margaret A. Hooks, and seeks to subject her interest in certain lands, to the payment of a joint note made by her and her husband, who had since died insolvent. She derived her interest in the land from the will of her mother-in-law, the clause of which relating to said lands is as follows: "I give and bequeath to my daughter-in-law Margaret A. Hooks, wife of my son David W. Hooks, all of my landed estate during her life, and after her death to all of her children begotten by said David W. Hooks equally. I wish further, that my son David W. Hooks to exercise entire control over said land and premises all the time; it is not, however, to be subject to his debts, but the rents and profits, and interest arising therefrom to be applied to the use and benefit of his wife and children."

"It is my further will and desire that my son David W. Hooks be vested with full powers of a trustee of his wife and children in the management of the landed estate, that I have heretofore given his wife Margaret A. Hooks and their children for their use and benefit, and it is my desire that he shall have full power, and I do hereby empower him to sell and dispose of said land, whenever he may think it to the advantage and best interest of his said wife and children to do so, and invest the monies arising therefrom in other lands for all the purposes of the first; and I wish it so understood that in the land, negroes, and other property, I have or herein give to my daughter-in-law Margaret A. Hooks and children, that my son David W. Hooks have full power to manage and control, and possess the same without restraint, but nothing thereof is to be chargeable with any of his debts."

The bill was demurred to on the grounds: 1. Because the bill showed that the defendant was a married woman at the time the said note was executed. 2. Because the bill fails to aver that the estate sought to be subjected, was created by deed or other instrument which excluded the marital rights of her husband. 3. Because the bill fails to show that the estate which it seeks to subject, was such an estate as the defendant, while a married woman, could charge by her contracts. 4. Because the will under which the defendant derived her interest in the lands created in her a statutory, and not an equitable estate. This demurrer was overruled, and from the decree thereon this appeal is prosecuted.

SNEDECOR & COCKRELL, for appellant.

J. COBBS, *contra*.

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BRICKELL, C. J.—The common law favored the marital rights of the husband, and though courts of equity recognized and enforced trusts for the separate use of the wife, to the creation of such trusts, it was essential there should have been a clear, unequivocal intent to include the rights of the husband, and to vest in the wife the separate use and enjoyment. No particular form of words was necessary, but from the language of the instrument, and all the circumstances disclosed in it, a plain intention that the marital rights of the husband should not attach, and that the wife should hold and enjoy free and independent of them, created the trust. All courts agreed upon this general principle, though as is to be expected, there is much conflict of decision in its application to the varying language employed by donors, in the instruments by which property is conveyed. The mere intervention of a trustee clothed with the legal title, the equitable title declared to be in the wife, but not limited to her separate use, did not prevent the marital rights of the husband from attaching to the interest of the wife, and of consequence did not create a trust for her separate use.—2 Brick. Dig. 82, § 170. Whether the trust was created, depended upon a careful consideration of the language, and of the whole scheme and purposes of the instrument.

The statutes creating the separate estates of married women have no reference to, and do not affect equitable separate estates, or trusts created by contract, gift, or conveyance for their use. These statutes operate only on “estates made separate by operation of law, not limited expressly to the separate use of the wife.”—*Short v. Battle*, 52 Ala. 456.

The devise and bequest to Margaret A. Hooks, is for her life, with remainder on her death to her children born of her marriage with David W. Hooks. The legal title is vested in the husband as trustee, and the rents, profits, and interest he is directed to *appropriate for the use and benefit of his wife and children*. As trustee, he is clothed with full power to *manage, possess, and control* the property for the use and benefit of the wife and children, and is empowered “to sell and dispose of said lands, whenever he may think it to the advantage and best interest of his said wife and children to do so, and invest the monies arising therefrom in other lands.” It is twice declared that the property given is not to be subject to the debts of the husband. Such a declaration will not of itself, create an equitable separate estate; it does not import an exclusion of the husband’s title, but simply one of the incidents of title.—*Bender v. Reynolds*, 12 Ala. 446; *Gillespie v. Burleson*, 28 Ala. 551. But such a declaration, accompanied

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by words which manifest an intention to create an equitable separate estate, may serve to explain and give meaning to such words. When taken in connection with all the words of this gift, the intention of the donor to exclude all marital rights of the husband, to confine and limit him to the title of a trustee, charged with specific powers and duties, is clear and unequivocal. The estate of the wife, the use of the property in common with her children, during her life, is therefore an equitable separate estate.

It is the well settled doctrine in this State, that in a court of equity, as to her equitable separate estate, a married woman is to be regarded as a *feme sole*, and may, without the concurrence of her trustee, unless she is specially restrained by the instrument creating the estate, dispose of it in any mode she may select. The specification of a particular mode of disposition, unless other modes are negatived, does not deprive her of the right to dispose of it in any mode, which would be lawful, if she were a *feme sole*.—2 Brick. Dig. 86, § 211.

Affirmed.

Burnett et al., Administrators, v. Nesmith, Administrator.

Action on Bond.

1. *Order of Probate Court appointing administrator; presumptions as to, on collateral assault.*—On collateral assault, an order of the Probate Court appointing the sheriff administrator of an estate, can not be held void, because the record does not disclose that there was no general administrator of the county, and no other fit person who would administer. As to such matters the court is one of original, general and unlimited jurisdiction; and the same presumptions must be made in favor of its decrees, as prevail in favor of decrees of courts of general jurisdiction.

2. *Grant of administration; who can not question validity of.*—Neither the sheriff nor his securities can be heard to question the validity of such grant, after the sheriff had accepted and acted under the grant, obtaining possession of the assets and converting them.

3. *Bond; what does not invalidate.*—Where, because of an administration committed to the sheriff, his bond becomes insufficient surety, and the probate judge thereon notifies the Commissioners' Court, then in session, which required the sheriff to give an additional bond in a penalty larger than that of a former bond, the fact that the judge of probate took and approved an official bond, reciting the facts, without stating the penalty prescribed in said order, and fixed the penalty at a much greater sum than that required in the order, will not render the bond invalid.

4. *Bond; who may sue on.*—When an additional bond is required of and

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executed by a sheriff, any person aggrieved by his subsequent defaults is entitled to sue on either the original or additional bond.

APPEAL from Fayette Circuit Court.

Tried before Hon. WM. S. MUDD.

This was an action by the appellee, Thomas B. NeSmith, as the administrator *de bonis non* of the estate of Isaac Mayfield, against the appellants, Peyton Burnett and Thomas J. Hogan, as the administrators of the estate of George Brown, and seeks to recover from the administrators of Brown the amount of a devastavit committed by George Cannon, as administrator in chief of the estate of said Mayfield, said Brown being one of Cannon's sureties.

Mayfield died intestate in 1861 or 1862, and Cannon, on the 5th of January, 1863, was appointed his administrator. Cannon was, at the time, sheriff of the county, acting as such under a statutory bond in the sum of ten thousand dollars. The order appointing him recites that, "This day came John T. Meador and filed his statement in writing and under oath, alleging therein that Isaac Mayfield, of this county, had departed this life more than twelve months past, without any will, and that said Mayfield left an estate to the amount of some ten or fifteen thousand dollars, which is liable to waste without the care and protection of an administrator; and the said Meador also alleges, that the said estate is indebted to him, wherefore he asks the court to appoint some suitable person administrator upon said estate so that he may be able to collect the money due therefrom; and none of the next of kin of said deceased having applied for said administration, and the property thereof being wasting, &c. It is ordered that George Cannon, now acting sheriff of said county, be and he is hereby, by virtue of his office as sheriff as aforesaid, duly appointed administrator *ex officio*," &c. Under this appointment, Cannon took possession of and administered on the estate of Mayfield. On the trial the plaintiffs offered in evidence the record of an order of the Court of County Commissioners, made on the 8th day of December, 1862, requiring said Cannon, as such sheriff, to give an additional bond in the sum of twenty thousand dollars. To the introduction of this evidence the defendants objected; their objections were overruled and they excepted. Plaintiffs then offered in evidence the bond of Cannon, on which the defendant's intestate was a surety. This bond is in the penal sum of fifty thousand dollars, and is dated December 15, 1862; it recites the election and qualification of Cannon as sheriff and the making of a prior bond in the sum of ten thousand dollars, and proceeds, "and the

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administration of some estates, now coming into his hands as such sheriff, the Court of County Commissioners ordered, on the 8th day of December, 1862, that the said George Cannon, sheriff aforesaid, enter into an additional bond for his performances," &c. There was also in evidence the record of a decree against Cannon, as administrator, in favor of NeSmith as administrator *de bonis non* of Mayfield, upon a settlement of the administration in chief, and a return of no property on an execution against him. John D. Terrell, a witness for the plaintiff, testified that he was the judge of probate of Marion county at this time, and was such at the time Cannon executed the bond sued on; that said bond was executed in the penalty of fifty thousand dollars, because he, as such probate judge, after the order requiring Cannon to execute a new bond, told said Cannon that he would not appoint him, as such sheriff, administrator of this and other estates, unless such bond was given, and that upon the execution of the bond sued on, Cannon was appointed administrator of the estate of Mayfield and administered on it. To the introduction of this evidence the defendants objected, their objections were overruled, and they excepted. This was, in substance, all the evidence, and the court charged the jury, "that if they should believe from the evidence that the bond, upon which this suit was brought, was made in order to enable the said Cannon, as sheriff of Marion county, to attain the administration of the estate of Isaac Mayfield and others who had died intestate in said county of Marion, and that said Cannon, by virtue of his office of sheriff of said county was, by the judge of probate of said county, appointed administrator of the estate of said Isaac Mayfield, deceased, and that he would not have been appointed such administrator unless he had executed said bond; and if the jury shall further believe that the appointment of said Cannon, as administrator of said estate of Isaac Mayfield, was made after the execution of said bond, and that he, in pursuance of said appointment, took possession of the assets and effects of said estate and administered the same, and acted under said bond in administering said estate, then said Cannon and his sureties in said bond are liable on the same for any default." To this charge the defendants excepted, and asked the following written charges: 1. "That if they believe from the evidence that said Cannon, sheriff, acted as such administrator, as well under said ten thousand dollar bond as under the fifty thousand dollar bond, the presumption of law is that he acted under the ten thousand dollar bond and not under the fifty thousand dollar bond, and no recovery can be had in this case on the fifty thousand dollar bond." 2. If the jury

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believe from the evidence that the said Cannon acted as such administrator under two bonds, the one a statutory bond and the other a common law bond, that there can be no recovery in this case on the common law bond, unless it be shown that the remedies on the statutory bond had been exhausted. 3. If the jury believe from the evidence, that the Commissioner's Court, as a court, ordered that said Cannon should give a twenty thousand dollar bond, and that the judge of probate aforesaid, of his own volition, required and insisted that said Cannon should give a fifty thousand dollar bond, instead of the twenty thousand dollar bond, as so ordered, and that said fifty thousand dollar bond was executed in deference to this requirement of the said judge, and is the bond sued on; and that at the same time there existed a valid statutory bond of ten thousand dollars, under which said Cannon was acting as sheriff, that then the said order of the said court is no legitimate basis for the said fifty thousand dollar bond, and no recovery can be had upon it in this case. 4. If the jury believe from the evidence that the said Cannon acted as such administrator under a valid statutory bond, ample to cover the deficit in this case, and also under the fifty thousand dollar bond sued on, that then the remedies on the said statutory bond must be first exhausted, before a recovery can be had on the fifty thousand dollar bond." The court refused to give each of these charges, and the defendants separately excepted.

There was a verdict and judgment for the plaintiffs, and the defendants bring the case here by appeal, assigning as error the various rulings to which exceptions were reserved.

W. R. SMITH and S. M. WOOD, for appellant,

E. P. JONES, *contra*.

BRICKELL, C. J.—It is contended by the appellants, that the order of the court of probate appointing Cannon as sheriff, administrator of the estate of Mayfield, is void, because the record of the appointment does not disclose that there was no general administrator of the county, and no other fit person who would administer. The statute on which the argument is founded, is in these words: "In case there is no general administrator, and no other fit person will administer, the court may commit administration to the sheriff or coroner of the county."—Code of 1876, § 2363. The constitution of force when the administration in question was granted, conferred on the court of probate original, general and unlimited jurisdiction of the grant of letters tes-

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tamentary; and of administration, creating it, as to that matter, a court of general jurisdiction. Its sentences, therefore, as to the grant of administration, are, when collaterally assailed, protected by the presumption extended to the judgments and decrees of all courts of general jurisdiction. Whatever within the jurisdiction is done, will be presumed rightful, until the contrary is shown. Facts which must have been ascertained by the court to exist, and upon the existence of which the regularity of its action depends, will be conclusively presumed to have been ascertained, unless the record affirmatively discloses the contrary.—*Ikelheimer v. Chapman*, 32 Ala. 676; *Gray v. Cruise*, 36 Ala. 559; *Coltart v. Allen*, 40 Ala. 155; *Russell v. Erwin*, 41 Ala. 292. The grant of administration to Cannon can not be pronounced void. Nor can it be admitted that he or his sureties, after he had accepted and acted under the grant, obtaining possession of the assets, and converting them, can be heard to question the regularity and validity of the grant.—*Thompson v. Bondurant*, 15 Ala. 346; *McWhorter v. McGehee*, 1 Stew. 546; *Sprowl v. Lawrence*, 33 Ala. 674; *Alston v. Alston*, 34 Ala. 15; *Williamson v. Wolf*, 37 Ala. 298.

It is next contended, the bond on which the action is founded is void, because it was taken by the probate judge of his own volition, in the absence of any statute expressly authorizing it, in a penalty greater than that which the court of county commissioners prescribed, and when the principal was acting as sheriff, under a valid statutory bond, sufficient in penalty to cover the default he has committed. The statute of force when the bond was executed, conferred on the judge of probate the authority to fix the penalty of the original official bond of the sheriff, not limiting the power in any respect, except that the penalty should not be less than five thousand dollars.—R. C. § 814. The grant of administration to Cannon, attached to his office of sheriff, and his official oath and bond, were a security for his faithful administration.—R. C. § 2010. The power to prescribe the penalty of the general official bond of the sheriff may be exhausted, when the bond is taken and approved, and there may not be in the probate judge any power subsequently to alter it.—*Harris v. Bradford*, 4 Ala. 214. And it is true there was no statute expressly conferring on the judge of probate, or the court of probate, authority to require of a sheriff an additional bond on the grant of an administration to him. Yet, if a faithful administration is to be secured, and the interests of creditors and next of kin are to be protected, there will often be a necessity for the exercise of such a power. The assets of a particular estate may, and often in fact, largely

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exceed the penalty of the general, or original official bond, which then becomes inadequate security. In that event the statute requires that the probate judge shall notify the grand jury, if the circuit court is in session, or if it is not in session the court of county commissioners, and an additional bond may be required.—R. C. § 2033. The circuit court not being in session, notice was given the court of county commissioners by the probate judge, and the bond in suit was executed, in the penalty of *fifty*, instead of *twenty* thousand dollars as prescribed by the court. Whether this would have any influence on it as a statutory bond, at common law, was decided in *Bagby v. Chandler*, 9 Ala. 770. There, the existing statute required that a constable's bond should be in the penalty of one thousand dollars, and it was taken in the penalty of two thousand dollars. The court said: "In our judgment, this does not affect it as a statutory bond. We need not consider whether the party could be made liable beyond the statute penalty, considered as a bond under the statute. For that amount it is certainly good under the statute." Now the statute, in express terms, declares the validity of official bonds, if the officer acts under them, is not affected, because they are not in the penalty, or payable, or with condition as prescribed by law.—Code of 1876, § 181. Before the enactment of the statute it was often decided that a statutory bond was not void because it varied from the form prescribed by the statute. So far as it conformed to the statute, it was valid; and if invalid for the residue, it was because it was violative of public policy.—*Whitted v. Governor*, 6 Port. 335; *Whitsett v. Womack*, 8 Ala. 466; *Boring v. Williams*, 17 Ala. 510; *Walker v. Chapman*, 22 Ala. 116. The judge of probate may not have had authority to increase the penalty of the bond beyond the sum the court of county commissioners had prescribed, but the want of authority does not render the bond invalid.

When an additional bond is required from and executed by a sheriff, any person aggrieved by his subsequent default is entitled to sue on either the original or additional bond. Code of 1876, § 190.

There is no error in the rulings of the circuit court, and its judgment is affirmed.

[Higgins et al. v. Mansfield.]

Higgins et al. v. Mansfield.

Action on Attachment Bond.

1. *Attachment bond; what damages recoverable on.*—The reasonable amount paid, or promised to be paid to attorneys for defending the attachment suit, and the value of time lost and expenses incurred in attending court for the trial, may be recovered in an action on the bond, for the wrongful or vexatious suing out of the attachment.

2. *Same; what damages too remote, for recovery on.*—Damage resulting from the demoralization of the plaintiff's hands, while he was absent from his farm, and procuring attorneys to defend the suit, or from plaintiff's being compelled to stop a double plow while he was absent, and the like, are too remote, and should not be estimated in fixing the value of plaintiff's services.

3. *Cases approved.*—The cases of *Sims v. Glazener*, 14 Ala. 698, and *Burton v. Holly*, 29 Ala. 319, declare the true rule as to what damages are, and what are not too remote.

APPEAL from Hale Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

This was an action on an attachment bond, commenced by the appellee, Charles H. Mansfield, against the appellants, Alfred W. Higgins and the sureties on the bond. The complaint claimed damages for the mere wrongful suing out of the attachment, and also vindictive damages for its vexatious suing out. The case was tried on the plea of the general issue. The plaintiff was permitted to testify, against the objection and exception of the defendants. 1. That at the time of the suing out and issue of the attachment for the suing out of which this action was instituted, he was engaged in the business of farming, and had a number of laborers employed, and was, at the time mentioned, having his land broken up preparatory to seeding the same. 2. That his son was employed by him on his said farm as a laborer, and was at the time mentioned above, plowing in the farm with a double plow. 3. That by reason of the levy, he and his son lost two days work from said farm. There was evidence that a replevy bond was executed, and that plaintiff's services were worth three dollars a day, and his son's services were worth two dollars and a half a day. 4. That plaintiff lost another day, by having to go to the town of Greensboro and employ counsel to defend the attachment suit. 5. That by reason of his absence during these three days, his laborers were demoralized and quit their work, whereby he was injured about fifty dollars. 6. That he had agreed to pay his

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counsel fifty dollars to defend the attachment suit. There was evidence that the attachment suit was defended and resulted in a verdict in favor of the witness. 7. That he and his son each attended the last preceding term of the circuit court as witnesses in said attachment suit, for ten days, and that their services were worth seven dollars and a half a day on the farm. 8. That he had been in attendance on the present term on account of said attachment suit seven days, and that his loss of time during these seven days was worth ten dollars a day, because it was picking time, and his being away from home left his cotton exposed. To each part of this evidence, as the same was offered, and at the time, and in the order as above set out as it was offered, the defendant objected, on the grounds—1. That it was illegal. 2. That the damages testified to were too remote. These objections the court successively overruled, and the defendant duly excepted. There was a verdict and judgment for the plaintiff, and the defendants bring the case here by appeal, assigning the admission of the evidence objected to as error.

GARRETT & WALKER, for appellants.

THOS. SEAY, *contra*.

STONE, J.—In *Herring v. Skaggs*, at the present term, we considered very fully the question, what damages are recoverable in an action for a breach of warranty, and held that only such damages as are the natural and proximate consequence of the act complained of can be recovered. The rule of damages in the present form of action is, in this respect, the same as that above stated.—*Hogan v. Thorington*, 8 Por. 428; *Kornegay v. White*, 10 Ala. 255; *Willis v. Dudley*, *ib.* 933; *Donnell v. Jones*, 13 Ala. 490, 509; *Sims v. Glazener*, 14 Ala. 695; *Donnell v. Jones*, 14 Ala. 680; *Marshall v. Betner*, *ib.* 832; *Goldsmith v. Picard*, 27 Ala. 142; *Burton v. Holley*, 29 Ala. 318; *Metcalf v. Young*, 43 Ala. 643. The cases of *Sims v. Glazener*, 14 Ala. 698, and *Burton v. Holley*, 29 Ala. 319–20, declare the true rule as to damages that are, and are not, too remote. The circuit court did not err in receiving evidence of counsel fees paid or promised for the defense of the attachment suit, and the reasonable value of such services. Neither was there error in allowing testimony of time lost, and expenses incurred, in attending court for the trial of that cause. The fact, however, that it was then cotton picking time, and the danger of losing cotton by reason of his absence from the cotton field, should not be estimated in fixing the value of his services, nor should the fact that he

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took a mule from the plow, exert any influence in the assessment. These were not the natural or proximate consequence of the issue and levy of the attachment. The evidence, numbered 3d, 4th and 5th in the bill of exceptions, was improperly admitted.—Drake on Attachment, section 175, *et seq.*
Reversed and remanded.

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Bill in Equity to establish Devastavit and hold Sureties of Administratrix liable.

1. *Bond of co-executors, to whom sureties on, not liable.*—Two or more executors or administrators entering into a joint bond for the faithful performance of their duties, are liable for the acts and defaults of each other, unless the bond itself shows that they did not intend to become so bound, and they and each of them come under the obligation to hold their sureties harmless against loss by any default on the part of either of the principals; and though one or more of the executors dies, the bond remains a security for the performance of duty by the other, unless proper steps are taken to have the bond made inoperative for future defaults.

APPEAL from Greene Chancery Court.

Heard before Hon. A. W. DILLARD.

The opinion states the facts.

ENOCH MORGAN, for appellants.

SNEDECOR & COCKRELL, *contra.*

MANNING, J.—Mary A. Stephens, one of the appellants, and John L. Stephens, appellee's intestate, were appointed executors of the will of James Stephens, deceased, and for their fidelity as such, executed their joint and several bond, with the other appellants, Cameron and Sanford, as their sureties. At the end of a year, the executors made a partial settlement, whereby it appeared that their disbursements, added to the costs of administration and the sum allowed them for commissions, exceeded their receipts of money to that time by about \$500.

Both executors continued to carry on the business of the estate, keeping it together according to the will, said John L. having the chief management, until his death, about six months afterwards. From the survivor, said Mary L., who continued in office, a large part of the property and assets

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of the estate was subsequently recovered by other persons claiming thereto a superior title. And the estate became insufficient to pay the debts.

Among those who sued as creditors of the estate was the administrator of the deceased executor, John L. Stephens, who, without having made any settlement of his intestate's administration, in the Probate Court, brought an action at law against the surviving executrix as such, in the Circuit Court of Greene county, for the sum above referred to, standing to the credit of both at the end of the first year of their administration, and he was allowed to recover judgment for one-half of that sum. An execution thereon having been returned "no property," the present suit was brought by the administrator of John L., by bill in equity, against Mrs. Mary A. Stephens, alleging devastavit by her, and against said Cameron and Sanford, the sureties upon the bond of herself and of plaintiff's intestate, to recover the amount of the judgment of the Circuit Court from them; and a decree was rendered therefor in his favor against them, from which this appeal was taken.

The judgment in the Circuit Court, though wholly erroneous, remains unreversed and unsatisfied.

Two or more executors or administrators entering into a bond together for the faithful performance of their duties, "are liable for the acts and defaults of each other, unless the bond itself shows that they did not intend to become bound for each other's defaults."—*Williams and Wife v. Morrison*, 19 Ala. 277; *Jones' Heirs v. Jones' Distributees*, 42 Ala. 218, and other cases cited in 1 Brick. Dig. 924, § 135, &c. The sureties to such a bond become responsible to creditors, distributees and heirs of the deceased for the faithful administration of his estate by their principals, the executors, and each of them. And they and each of them, (the principals,) come under obligation to hold their sureties harmless and indemnified against loss by any default on the part of the principals. These are the duties towards one another that spring out of the relations created by the bond.

This instrument does not become void and inoperative by the death of any one of the parties. Should one of the executors die, of course he becomes unable to perform any acts of administration. But the bond remains in force as a security for the proper performance by the other of his duties in respect to the estate, unless some one of the obligors shall, according to law, have the bond made inoperative for future defaults.—*Moore v. Wallis et al.*, 18 Ala. 458.

Now, in the cause before us, the relations and liabilities of the parties are inverted. By the decree, one of the prin-

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cipals recovers of his sureties damages for a supposed default of either himself and his co-principal, or of the latter alone. This is manifestly erroneous.

Let the decree of the Chancellor be reversed and the bill be dismissed.

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Junkins v. Lovelace et als.

Bill in Equity to Redeem Lands, etc.

1. *Execution; purchaser at sale under, what acquires.*—The purchaser of property, real or personal, at execution sale, acquires no other or greater interest therein, than was possessed by the execution debtor at the time of the sale.

2. *Equity of redemption of lands; what purchaser of, at execution sale acquires.* Prior to the Code of 1852 an equity of redemption in lands was not the subject of a levy and sale under execution at law; and, under the present statutes, the purchaser of such equity at execution sale, acquires no greater interest than the debtor, and is subrogated to all the rights, and subject to all the disabilities of the judgment debtor.

3. *Receiver; when should not be appointed.*—The purchaser at execution sale of the equity of redemption in mortgaged lands has no equity, upon seeking redemption from the mortgagee, to compel the application of personal property embraced in same mortgage, to the payment of the mortgage debt to the exoneration of the land; and the appointment of a receiver to take charge of such personalty, upon bill filed by the purchaser to redeem the mortgaged lands, and an order for its sale and the application of the proceeds to the mortgaged debt in case of the land, are erroneous.

4. *Mortgage to secure future advances; what embraces.*—A mortgage to secure future advances, which, on its face, gives notice as to the extent and purpose of the contract, will prevail over the claim of a purchaser at execution sale, under a levy made after its execution, although such execution issues on a judgment recovered prior to the execution of the mortgage; and it is not necessary for such mortgage to specify any particular or definite sum which it is to secure; it is sufficient to show a contract that it is to stand as security to the mortgagee for such indebtedness as may arise from future transactions with the mortgagor.

5. *Advancements by mortgagee to tenants of mortgagor; right to priority of satisfaction out of crop grown on rented premises.*—A mortgagee who advances to tenants of the mortgagor, and who receives the crops grown by such tenants, has the right to apply such crops to the payment of such advances, after paying the rent due, in priority to the debt secured by the mortgage.

6. *Rent of mortgaged premises; to whom belong.*—A mortgagor until the entry of the mortgagee, after condition broken, is entitled to the rents of the mortgaged premises, unless the mortgagee intercepts them by notice to the tenants; and the purchasers of the equity of redemption are entitled to rents falling due after their purchase, subject to all equities then existing.

7. *Homestead; exemption of, as to debt contracted in 1866.*—The act of April 23, 1873, repealed all prior exemption laws as to debts contracted prior to the constitution of 1868, and the result was there was no law of force in April, 1875, which allowed to the heads of families any exemption of a homestead, as to a debt contracted prior to the adoption of the constitution of 1868.

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APPEAL from Perry Chancery Court.

Heard before Hon. CHARLES TURNER.

The original bill in this case was filed by the appellees, Webb and Beck, against the appellants, C. W. & J. B. Lovelace, and George Junkins. The defendant Junkins filed a cross-bill, and the appeal by him is from the decree rendered thereon. The material facts may be thus stated: In the year 1873, Crenshaw Lovelace & Co., were merchants doing business in Marion. George Junkins was then engaged in farming. On the 11th day of January, 1873, Junkins executed his note to Crenshaw Lovelace & Co., for the sum of one thousand dollars, payable October 15, 1873, and on the same day, to secure the payment of the note, he executed a mortgage on all the crops raised by him during that year, two mares and two mules, and one four-horse wagon. This note and mortgage recited that they were made in consideration of advances to make a crop. This mortgage, as do all subsequent mortgages executed by him, contains a stipulation that it should stand as a security for any amount advanced in excess of the stipulated sum. Upon a settlement at the close of the year 1873, it was ascertained that Junkins was indebted to Crenshaw Lovelace & Co., in the sum of \$1,406 66. On the 12th day of January, 1874, Crenshaw Lovelace & Co., agreed with Junkins to extend the time of payment of said balance of \$1,406 66 until the 15th day of October, 1874, and, in addition thereto, agreed to advance him two hundred dollars to enable him to make a crop during that year, and on that day Junkins gave them his note for the sum of two hundred dollars, and to secure the payment of this note, and the balance then due them, he executed and delivered to them a mortgage signed by himself and wife, on the same personal property embraced in the mortgage of 1873, and on certain real estate in the county of Perry. This mortgage was acknowledged and filed for record on the day of its execution. In the latter part of the year 1874, or early in 1875, J. B. & C. W. Lovelace purchased of Crenshaw his entire interest in the firm of Crenshaw Lovelace & Co. At the close of 1874, Junkins was indebted to the firm in the sum of \$1,460 60, which then, or soon after, became the property of J. B. & C. W. Lovelace, and the mortgages to secure the same was duly transferred to them. Junkins was unable to pay this balance, and it was agreed between him and the Lovelaces that he should be given an extension of the time of payment of such balance, until the first day of November, 1875, and that they would advance him three hundred dollars to make a crop during the year 1875. On the 25th day of March, 1875, Junkins gave his

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note for the three hundred dollars, and to secure the amount and the balance, due the Lovelaces, he executed a mortgage to them, conveying all the crops raised by him that year and certain personal property. This mortgage recites the prior mortgages given to secure the balance due. During the year 1875, certain portions of the land owned by Junkins were rented by him to certain tenants. J. B. & C. W. Lovelace agreed to advance, and did advance, to these tenants, the necessary amount to enable them to make crops. The amount of these advances was charged to Junkins. As the tenants gathered their crops, they delivered them to the Lovelaces, who sold them and applied the proceeds, first, to the payment of advances due by them, second, to rent due to Junkins, and the balance was paid over to the tenants, and Junkins' account credited with the rent due to him.

On the 18th day of March, 1875, the appellee, James E. Webb, recovered a judgment in the Circuit Court of Perry county against Junkins, on a debt contracted in 1866, and on the 25th day of the same month the appellee, Henry Beck, recovered a judgment in the court, against Junkins. Executions were issued on each of these judgments on the 19th day of April, 1875, and were received by the sheriff on the 8th day of May, 1875. Each were returned "no property," and on the 23d day of October, 1875, *alias* executions were issued on both judgments, and were placed in the hands of the sheriff on the same day, and on the 2d day of December, 1875, both executions were levied on the lands conveyed by Junkins and wife to Crenshaw Lovelace & Co., in their mortgage dated January 12th, 1874. These lands were sold by the sheriffs under the *alias* executions, subject to Junkins' exemption, at which sale the appellees, Webb & Beck, became the purchasers, and the sheriff executed a deed to them bearing date 7th day of February, 1876.

At the close of the year 1875, Junkins, upon a settlement with the Lovelaces, was still indebted to them in the sum of \$1,168. On the 26th day of January, 1876, the Lovelaces advanced to Junkins two hundred and fifty dollars to enable him to make a crop during the year 1876. Junkins gave his note for the amount advanced, and to secure this note and the balance due, gave the Lovelaces another mortgage dated January 26th, 1876, by which he conveyed to them all the crops raised by him during that year, and the same personal property conveyed by his prior mortgages to them. This mortgage was filed for record March 6, 1876.

On the 11th day of March, 1876, the appellees, Webb and Beck, filed their bill, in which, after setting out the rendition of their judgments against Junkins, the issuance of exe-

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cution thereon, and the levy on, and sale of the lands thereunder, and their purchase at the sale, they allege that all of the transactions between Crenshaw, Lovelace & Co. and J. B. & C. W. Lovelace and the said Junkins are usurious, and that they have the right to have the indebtedness of said Junkins to them reduced in consequence thereof. They also allege that as to them, all of the mortgages made by Junkins to the Lovelaces are void, as to all advances made by them beyond the amount for which Junkins gave his promissory notes. They ask for a discovery as to the actual amount owing by said Junkins to said Lovelaces; that the personal property conveyed by Junkins to the Lovelaces be first sold and the proceeds be applied to the payment of the amount so ascertained to be due, and that they be permitted to pay the balance and redeem the land, or that the land be sold under decree of the court, and after paying the balance due the Lovelaces, the remainder be paid to them. They also claimed that they were entitled, as against the Lovelaces, to the rent of the land for the year 1876, and had the right to have the crops grown by Junkins that year first applied to the payments of these rents. They also prayed for the appointment of a receiver to take charge of the rents, &c., and the chancellor appointed the register such receiver.

At the fall term, 1876, the cause was submitted, and was held up for consideration and decree in vacation. On the 21st of December, 1876, the Chancellor rendered a decree, in which he decided that Webb and Beck were entitled to the rent of the land for the year 1876; that the Lovelaces were only entitled to the advances made by them to Junkins up to April 15th, 1875, not exceeding three hundred dollars in amount, including interest on the \$1,460 and the usual commissions for advancing; that the complainants are entitled to have the personal property embraced by the mortgages first sold, and the proceeds applied to the mortgage debt, before resort could be had to the land, and ordered the Register to take possession of and sell the personal property embraced in the mortgages to the Lovelaces.

The Register executed the reference, and submitted his report, with the testimony taken by him, to the spring term, 1877. Exceptions to his report were filed both by the complainants and the Lovelaces, but before the hearing thereof, and during the same term of the court, the Lovelaces filed an application asking for a rehearing in the cause, and for a modification of the decree rendered. Upon the hearing of this application, the Chancellor granted the rehearing, and made another decree, so modifying the former decree as to allow the Lovelaces the full amount advanced by them to

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Junkins in 1875, and also directing that, on another reference, the Register separate the advances made by the Lovelaces to Junkins in 1875, from the advances made by them to the tenant of Junkins during the same year. Another reference was had, and a report made to the Chancellor in vacation, as directed by the decree ordering the same. Exceptions were filed by both parties to this report, but before the same was heard or passed on by the Chancellor, the complainants, Webb and Beck, made a motion "to open, vary, alter and change the last preceding decree, on the ground that their judgments were a lien on the lands and property of Junkins, superior to the mortgage to the Lovelaces." This motion was heard by the Chancellor, at chambers, in Selma, and on the 25th day of June, 1877, he made another decree, declaring that the judgments of the complainants were liens prior to the mortgage of March 25th, 1875, and that the Lovelaces were not entitled to recover for any advances made by them to Junkins in 1875. The Lovelaces appeal from this decree.

At the sale under the executions in favor of Webb and Beck, Junkins gave public notice that he claimed one hundred and sixty acres of the land levied on, as his homestead exemption, and forbid the sale of said one hundred and sixty acres. The Chancellor decreed that Junkins was not entitled to any exemptions against the debt due to Webb, or against the debt secured by the mortgages to the Lovelaces executed by Junkins and his wife. The appeal of Junkins is taken from this decree.

LAWSON & MOORE, and BROOKS & ROY, for J. B. and C. W. Lovelace.—The Lovelaces acquired, by their mortgage of March 25th, 1875, a legal title to the crops raised by Junkins in 1875. It is too well established in this State to be questioned, that a growing crop, or crops to be raised, can be sold or mortgaged, and the purchaser or mortgagee acquire a good title.—50 Ala. 49; 48 Ala. 109; 47 Ala. 363; 18 Ala. 509; 14 Ala. 702; 11 Ala. 977; 5 Ala. 740. The consideration of this mortgage was ample and sufficient. Upon the execution and delivery by Junkins of the note and mortgage of that date, the contract was perfect and complete. The rights, duties and obligations of the parties were clearly defined. The judgments of Webb and Beck were not liens on the property of Junkins.—See *Dane v. McArthur*, 58 Ala. 320. At the time this mortgage was made, there were no executions in the hands of the sheriff, and even if there had been, they would constitute no liens on the crops of that year. Our statutes expressly forbid the levy of an execution on a

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growing crop, and if the execution could not be levied on the crop, it could constitute no lien on it. The Lovelaces were entitled to the crops of 1876. The fact that the executions had been levied on the lands, could make no difference. Webb and Beck, by their purchase at the sheriff's sale, did not become the owners of the land. They only purchased Junkins' equity of redemption, and thereby became subject to his disabilities and subrogated to his rights only.—Code, § 3209 ; 31 Ala. 447. The law day of the mortgage of 1875, having passed, the Lovelaces were, as against Junkins, entitled to the possession of the land. Being entitled to it against Junkins, they were entitled to it against Webb and Beck, who stood precisely in his possession.—51 Ala. 222.

The appointment of a receiver is an extreme and harsh remedy, and it should never be done, except in cases where it is clearly shown to be absolutely necessary to protect the rights of the parties. It is not pretended that the Lovelaces were insolvent, or that they would not be able to respond to any decree the Chancellor might make. In the absence of any such showing, the Chancellor should not have appointed a receiver.

By their purchase, Webb and Beck acquired no right to have the personal property, embraced in the mortgages to the Lovelaces, sold and its proceeds applied in exoneration of the land. They had only the rights which belonged to Junkins, and he certainly could not have compelled such a sale. They acquired, by their purchase of the equity of redemption in the lands, no right in or title to the personal property, and there is no rule of equity by which they can assert or claim a right to have the personal property first applied to the payment of the mortgage debt. They acquired only the right to redeem the land, upon the payment of the mortgage.

JAMES E. WEBB, for Webb and Beck.—By their purchase at sheriff's sale, Webb and Beck acquired a right to be subrogated to the rights of the mortgagor, upon payment of the amount due the mortgagee, to have the personal property which is included in the same mortgage with the land, sold to the exoneration, either in whole or in part, of the land. The bill offered to pay what was due to the Lovelaces, and the enforcement of the mortgage after their debt was paid, could work no injury to them. The only person who could be affected by it was Junkins, the mortgagor, and he does not join in the assignments of error by the Lovelaces. Hence, if there was error in the Chancellor's decree, marshaling the mortgage securities, it was error without injury

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to appellants, the Lovelaces. While it may be admitted, that only the equity of redemption passed by the sheriff's sale, we insist that the personal property should be first applied to the mortgage debt. In equity, the mortgage stood solely as a security for the debt, and the security was upon the whole property, and though Webb and Beck bought only the equity of redemption in the land, they bought that equity, subject to the highly equitable principle that they would be entitled to have the mortgage assets marshalled upon the payment of the debt to the mortgagees. The sheriff's deed conveyed exactly what a deed from Junkins would have conveyed, and it will surely not be contended that if Junkins had conveyed to Webb and Beck, upon payment by them of the mortgage debt, they would not be entitled to be subrogated to the right of the mortgagees, for the purpose of having the mortgage foreclosed on the property belonging to the mortgagor which remained unsold.—See 56 Ala. 321; 35 Ala. 717. As to the appeal by Junkins, the debt on which the Webb judgment was recovered, was contracted in 1866. At that time the statute declared what should be the exemption of the debtor. There was no constitutional provision in regard to exemptions. The act giving the exemptions was repealed, and the exemption was lost by its repeal. The law in force at the time the debt was created, is the rule by which the exemption must be measured, and the statute in force at the date of the contraction of the debt being repealed, the subsequent enactment of constitutional and statutory provisions in regard to exemptions, can exert no influence in this case.

W. B. MODAWELL, for Junkins.—Webb and Beck did not purchase the homestead of Junkins at the sheriff's sale. They purchased subject to his right of exemption. Exemption laws for the benefit of residents and families have always been liberally construed.—1 Brick. Dig. 908, § 255; 28 How. 125; 45 Ala. 168; 1 Story Eq. §.560; 21 N. Y. 249; 48 N. Y. 188. Public policy requires a liberal construction of homestead laws in favor of the owners. If Webb and Beck be permitted to subrogate themselves to the rights of the mortgagees and thus deprive Junkins and his family of their homestead, it would be an invasion of their rights secured by the laws of Alabama, and contrary to a sound public policy recognized by all the States, and such a decree would subvert the spirit and policy of the law.—*Andrews v. Rowan*, 28 How. 126. Junkins interposed his claim to the exempted property before it was sold, and he is entitled to the exemp-

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tions allowed by the law, as it stood when he contracted the debt to Webb.

BRICKELL, C. J.—A sale of property, real or personal, under execution, passes to the purchaser no other or greater interest than that which the defendant may have when the lien of the execution attaches, or may acquire before the sale, no question arising as to conveyances by the debtor in fraud of creditors. The lands claimed by the appellees, Webb and Beck, as purchasers at execution sale, were under a mortgage prior to the rendition of the judgments and the issue of executions thereon, under which they purchased, the validity of which is undisputed. The only interest of the judgment debtor was an equity of redemption. The statute subjecting to levy and sale, under execution at law, an equity of redemption in either land or personal property declares: "The purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities."—Code of 1876, § 3209.

Prior to the Code of 1852, an equity of redemption in lands was not the subject of levy and sale under execution at law. It is a valuable interest in and to lands; in equity comprehending the beneficial ownership, the mortgage being regarded as a mere security for the payment of the mortgage debt. Through the medium of a court of equity, judgment creditors could redeem, or they could compel the mortgagee to a foreclosure by sale, and subject to the satisfaction of the judgment, whatever surplus of the proceeds of sale remained after satisfying the mortgage. The purpose of the statute is to benefit the mortgagor and his judgment creditors alike, by subjecting the equity of redemption to levy and sale under execution at law, avoiding the delay and expense of a suit in equity, and having it applied to the payment of debts other than the mortgage debt. When the sale is made, however, it is of the equity of redemption, of no other or greater interest, and the statute in words expresses the legal consequence—the purchaser *is subrogated to all the rights, and subject to the disabilities* of the mortgagor. The mortgage remains as valid and operative as a security, encumbering the lands to the same extent it encumbered them while the equity of redemption remained in the mortgagor. The premises continue the primary fund for the payment of the mortgage debt, and the purchaser of the equity of redemption takes it subject to the paramount lien of the mortgage. His purchase is of the equity only; it is its value only, the law intends, for which he bid and paid. While he incurs no personal liability for the payment of the mortgage

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debt, whatever of interest he acquires in the land is subject to the mortgage.—*Meyer v. Prayn*, 7 Paige, 470; *Vanderkamp v. Shelton*, 11 Paige, 28; *Fink v. Reynolds*, 33 Ill. 495; *Stephens v. Church*, 41 Conn. 369; *Tice v. Annin*, 2 Johns. Ch. 128. The mortgagor is not bound legally or equitably to pay the mortgage debt, or contribute to its payment, for the ease or benefit of the purchaser of the equity of redemption.—*Cherry v. Munn*, 2 Barb. Ch. 318; *Russell v. Allen*, 10 Paige, 249. Nor to aid in redemption has the purchaser the right to require that the mortgagee shall exhaust other securities for the payment of the mortgage debt.—*Stephens v. Church*, 41 Conn. 369. The principle prevailing in the marshaling of assets, or between creditors with liens or incumbrances, that when one has a lien on two different parcels of land, or on two funds, and another has a junior lien on one only of the parcels, or on one only of the funds, the prior creditor or incumbrancer will be compelled to exhaust that fund first, to which the junior cannot resort, cannot be invoked by the purchaser. He stands in the place of the mortgagor, having no other or greater rights, and is *subject to his disabilities*. A debtor, bound absolutely to the payment of his debt, (unless his homestead rights are involved, and as to these we express no opinion,) can have no equity to compel the election of his creditor, as to which of two funds equally liable, shall be applied in payment of the debt. *Rogers v. Meyer*, 68 Ill. 92. Payment of the debt, his legal and moral duty will relieve each fund. The rights of the purchaser of the equity of redemption are no other or greater than the rights of the mortgagor.

The principle is a pure equity, founded in a broad and comprehensive justice, akin to the maxim, *sic utere tuo ut alienum non ledas*. It is never applied and enforced, to the injury, or to lessen the rights of third persons. If the purchaser could compel the mortgagee to exhaust other securities for the payment of the mortgage debt, to aid him in redemption, the injustice would result of compelling the mortgagor to pay, or contribute to the payment of the mortgage debt, increasing the value of the equity of redemption for the benefit of the purchaser. The equities of the mortgagor and of the purchaser would be reversed, as between them the land is primarily liable for the payment of the mortgage debt, and if that should be satisfied from other property of the mortgagor, a court of equity would subrogate him to the rights of the mortgagee against the land. In *Tice v. Annin*, 2 Johns. Ch. 128, said Ch. Kent: "If a judgment creditor, other than the mortgagee, sells the equity of redemption, the mortgagor reaps the benefit of that equity, by having it ap-

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plied towards the payment of his other debts, and the mortgage debt remains, without any confusion, as a distinct and separate incumbrance; and if the mortgagee, in such a case, should elect to proceed against the original debtor at law, instead of seeking to foreclose his mortgage, and should endeavor to collect his money out of other property of the mortgagor, this court must either stay such a proceeding, or compel him, upon payment, to assign over his debt and security to his debtor, so as to enable the debtor to indemnify himself out of the mortgaged premises. The one course or the other would be indispensable to prevent the purchaser of the equity from obtaining and holding the whole interest in the land, when he purchased and paid only the value of the equity of redemption." Nor can any inquiry be entered upon as to whether the purchaser bid and paid more than the real value of the equity of redemption. The maxim, *caveat emptor*, applies in all its rigor to judicial sales, and no fraud being imputable, the injudiciousness of the purchaser cannot create an equity in his favor.—*O'Neal v. Wilson*, 21 Ala. 288. The necessary legal intendment is, that he paid no more than the value of the equity of redemption, the value of the lands, the mortgage debt being deducted, and if he could throw the payment of the mortgage debt on the mortgagor personally, or on other property of the mortgagor, he would obtain an interest in the lands he had not bought, and for which he had not paid. It results, the Chancellor erred in appointing a receiver to take charge of the personal property conveyed by the mortgage, and in ordering its sale, and the application of the proceeds of sale to the payment of the mortgage debt.

There is great contrariety of opinion as to the validity, and the operation of mortgages intended as a security for future advances, and when the rights of judgment creditors, or of subsequent purchasers, or of junior incumbrancers, are involved, many difficult and embarrassing questions arise.

The Supreme Court of Mississippi, in a very careful opinion, state a view of the doctrine, which seems to us supported by principle and by the weight of authority: "A mortgage to secure future advances, which on its face gives information as to the extent and purpose of the contract, so that a purchaser or junior creditor may, by an inspection of the record, and by ordinary diligence and common prudence, ascertain the extent of the incumbrance, will prevail over the supervening claim of such purchaser or creditor as to all advances made by the mortgagee within the terms of such mortgage, whether made before or after the claim of such purchaser or creditor arose. It is not necessary for a mort-

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gage for future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity of all extraneous inquiry. If it contains enough to show a contract that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and, if he fails to make it in the proper quarter, he cannot claim protection as a *bona fide* purchaser."—*Witczinski v. Everman*, 51 Miss. 846; see, also, 1 Jones on Mort. § 364, *et seq.*, and authorities cited. We do not understand that the case of *Allen v. M. R. R. Co.* 11 Ala. 451, conflicts with this view. The mortgage or trust deed in that case, was not a security for a creditor who had come under an obligation, express or implied, to the mortgagor to make future advances. Its object was to secure bonds issued, and to be issued for the construction of a railroad. Until the issue and negotiation of the bonds the mortgage was inoperative as a security—there was no creditor to whom the mortgagor was bound, and none under any obligation to him. But when there is a contract existing, on the faith of which and the security of the mortgage, the creditor makes advances, and promises future advances to a definite amount, or for a specified purpose, the mortgage is a valid security for all the advances the creditor has bound himself to make, and will prevail over subsequent incumbrances, whether these are created by the contract of the mortgagor, or by operation of law.—1 Jones Mort. §§ 364, 370–372.

In the present case, the mortgage recites as one of the debts secured, the sum of three hundred dollars advanced on the day of the execution of the mortgage, to enable the mortgagor to make a crop. The proof shows that sum was not then advanced, but there was a verbal agreement that it should be, and it was advanced for the purpose expressed, during the year in which the crop was raised. The verbal agreement was sufficient—it imposed on the mortgagees the duty of making, and the liability to make advances to the amount expressed, and from the duty and liability they were not absolved, because before the amount had been advanced, judgments were rendered and executions issued against the mortgagor, of which they had no notice; and of the fact of notice, at any time before they had made the advances, this record furnishes no evidence.—1 Jones Mort. § 375. The mortgage was properly recorded, and whoever after its execution, acquired any lien or encumbrance on the property mortgaged, acquired it with constructive notice of the prior right, duty and liability of the mortgagees, and in subordination

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to it. The chancellor consequently erred in disallowing the lien of the mortgage, as a security for the advances, to the full amount expressed, whether the advances were prior or subsequent to the lien of the executions under which Webb and Beck purchased the equity of redemption in the lands. It seems to be supposed, the judgments operated a lien, and as the mortgage was subsequent to their rendition, it could not as against them afford a security to the mortgagees. The chancellor was misled by a decision of this court, which was recalled during the term it was rendered, but not recalled until he had pronounced judgment. Judgments are not liens—the execution operates a lien, “on the lands and personal property of the defendant, subject to levy and sale, from the time only that the writ is received by the sheriff.” Code of 1876, § 3210. The mortgage was prior to the delivery of executions to the sheriff, and of consequence had precedence over them, for all advances made to the extent of three hundred dollars.

Whatever advances were made to the laborers of the mortgagor, by the mortgagees, should be deducted from the proceeds of the sales of the crops, so far as they were received by the mortgagees, in priority of the three hundred dollars advanced to the mortgagor and the precedent mortgage debt. There is manifest injustice in permitting the mortgagor, or his judgment creditors, or the purchasers of the equity of redemption in the lands, to claim the benefit of the proceeds of the sales of the crops, until these advances, which were contributions to the production of the crops, have been paid.

The rents for 1875, which Junkins may have received, or which the tenants may have paid to the mortgagees, stand on a different footing. The appellees either as judgment creditors, or as purchasers of the equity of redemption, have not a shadow of claim to them. As purchasers of the equity of redemption, they can have none, because their purchase was subsequent to the time when the rents accrued. As judgment creditors they can have none, because on the rents their executions were not a lien. In the accounting of the mortgage debt, they ought not to be computed, unless before the sheriff's sale, the mortgagor, or mortgagee, had applied them to the payment of the mortgage debt, and then only to the amount which remained after satisfying the advances made to the tenants by the mortgagees.

A mortgagor, until the entry of the mortgagee, after condition broken, is entitled to the rents and profits, unless the mortgagee intercepts them by notice to the tenants. The purchasers of the equity of redemption became entitled to the rents of 1876, falling due after the conveyance to them.

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Smith v. Houston, 16 Ala. 111; *Tubb v. Fort*, 58 Ala. 277. As assignees of the mortgagor by operation of law, they became entitled to the rents; and they take them subject to all the equities, to which they were subject before and at the time of the assignment.—*Taylor's Land. & Tenant*, § 437. Whatever advances were made to the tenants, by the appellants, under the mortgage of the crops of 1876, must be deducted from the rents, and it is the remainder only to which the appellees are entitled. The mortgage was executed, and an equity in favor of the appellants created before the assignment to the appellees, and to the equity the assignment is subject.

The decree of the chancellor on the original bill must be reversed, and the cause remanded for further proceedings in conformity to this opinion.

The questions arising in the appeal from the decree on the cross-bill, are *first*, as to the right of the mortgagor to a homestead in the premises, he having but an equity of redemption therein; *second*, whether as against the appellee Webb, whose judgment was founded on a contract or debt created in 1866, the laws of force when the judgment was rendered, and the sale made allow a homestead? The *second* question alone is necessary to consider. The exemption of property, real or personal, in which a debtor has an actual beneficial interest, from liability for the payment of debts, is derived from, and dependent on statutory or constitutional provision. The statute, or constitutional provision of force, when the debt is contracted, not subsequent statutes or constitutional provision, define and declare it. When the debt to Webb was contracted, the statutes were of force subjecting to levy and sale, an equity of redemption in real estate, or in personal property, and they have been continued without interruption.

The constitution of 1868, which the constitution of 1875 follows in this respect, declared exemptions of property from liability for debts, but limited the exemptions to debts contracted subsequent to the time when these constitutions became law. Before either constitution, it had been a legislative policy, to save debtors, the heads of families, having on them wife or children, in a condition of legal dependence, whom they were bound by law to maintain, from being reduced to want and inability to discharge the legal duty of maintenance. Various statutes founded in this policy, were from time to time, through a period of more than forty years enacted, and were incorporated in the Revised Code of 1867. The act of April 23, 1873, in all its terms, letter and spirit, a revision of all former statutes relating to the subject (Pamph.

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Acts 1872-3, p. 64), repealed in express words and by express reference to the Revised Code, the former statutes to which we have referred, and "all other statutory laws and parts of statutory laws, heretofore in force in this State, exempting property from the payment of debts or administration, or relating thereto." The result was, that as to all debts contracted prior to the adoption of the constitution of 1868, after the enactment of this statute, there were no exemptions of any property to heads of families, or to the resident having no family. The statutes in existence when the debt was contracted, were repealed. The exemptions allowed by the act of April 23, 1873, passed after the debts were created, different from and exceeding those allowed by former statutes, could not be claimed. The constitution of 1868, applied to debts contracted after its adoption, and not to prior debts. There was then no law of force when the lien of Webb's execution obtained, and when the sale by the sheriff was made, under which an exemption could, as against it, be claimed. The purchaser at execution sale takes the property with the full benefit of the lien of the execution. The sheriff, by virtue of the lien of this execution, whatever may have been the rights of the defendant as against the execution in favor of Beck, could sell and convey to the purchaser the equity of redemption, free from the claim or right of homestead of the mortgagor. There was no such right as against the purchasers at the execution sale—no law conferring it. The cross-bill was, therefore, properly dismissed, and the decree of dismissal is affirmed.

National Commercial Bank of Mobile v. Mayor, Aldermen & Common Council of Mobile.

1. *National Banks; how far subject to State taxation.*—National banks, or banking associations, being instrumentalities of the General Government, are not subject to control or taxation by the States, except in so far as Congress may expressly permit.

2. *Same.*—Real estate owned by a National Bank is taxable by State authority; and the separate shares of its capital stock, as personal property of the holder of such shares, may be taxed by the State or its municipal subdivisions, so long as the tax "is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and the shares owned by non-residents are taxed at the place where the bank is located.

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3. *Same; what assessment illegal.*—An assessment upon the shares in gross, or upon the capital stock of the bank, against the corporation, is not authorized by the act of Congress, and is illegal.

4. *Bank; when may be required to pay tax on shares of stock.*—A State may require a National Bank to pay for its stockholders the taxes legally assessed against their respective shares

5. *Injunction to restrain collection of tax illegally assessed; when does not lie.*—An injunction will not lie to restrain the collection of a tax illegally assessed by municipal authorities upon the shares of a National Bank in gross, instead of against the individual share-holders, though such municipal corporation be insolvent; there are ample remedies at law.

APPEAL from Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

This was a bill in equity filed by the National Commercial Bank of Mobile against the Mayor, Aldermen & Common Council of the City of Mobile, and W. H. Sheffield, its tax-collector, seeking to enjoin the collection of a tax, which the corporate authorities assessed upon the shares of the capital stock of the bank in gross.

The bill shows that the bank was incorporated on the 13th day of May, 1871, and chartered as a national banking association, under the laws of the United States, and is located and doing business in the city of Mobile. It avers that at the time of the assessment upon its capital stock in gross, the same "was not and is not the property of the banking corporation, but was and is owned by a great number of different persons, some of whom are not residents of Mobile, and many of whom are not residents of the State of Alabama, and that this capital stock is invested in bonds of the United States, in the office of the Comptroller at Washington."

The authority of the City of Mobile to assess and collect the tax is denied, and reference is made to the act of Congress to provide a national currency, secured by pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June 3, 1864, and the act of the General Assembly of Alabama, entitled an act to fix the rate of taxation upon the shares of national bank associations and savings banks in the State, approved February 27, 1875. The bill alleges that the bank paid the city taxes on its real estate, but not upon its capital stock, and the city tax-collector is proceeding to collect the same, and has levied on certain personal property of your orator, and advertised the same for sale, and will sell it, unless restrained, &c.

It is also stated, that the municipal corporation of Mobile is insolvent; that executions against it have been returned *nulla bona*, and "that all its property and the income are under a statutory mortgage, which amounts to more than

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the value of its property, and any income it can lawfully raise." Sheffield is alleged to be a man of small means, and unable to respond to any judgment which might be obtained against him, to recover the tax assessed upon the capital stock, which tax amounts to over \$10,000.

The bill further alleged that "if such illegal tax be collected of your orator, it could not retain the same legally, or successfully, or under any law, out of the dividend of the share-holders on whose shares such taxes are demanded, the amount of such illegal taxes as it might pay, and that it could not collect by law such taxes if paid, from the several share-holders, owners of the stock so assessed, and that the enforcement of such illegal tax out of your orator would subject it to great loss and injury, for which the law affords no adequate remedy, and that such would also be the result if the bank paid the taxes, and subjected to suits, as it might be, by each of the shareholders, by reason of so doing, and that in either event a multiplicity of suits would be rendered necessary to adjust the rights of the parties, and that irreparable damage would be done to your orator."

The bill prays that the defendants be perpetually enjoined from proceeding to collect said pretended taxes from your orator, and that the property levied on may be released and returned, and for such other and further or different relief as might seem meet. A temporary injunction was also prayed and granted.

The answer of the defendants, which was put in on oath, admits the corporate character of the bank, and the assessment and levy, as averred in the bill. It states that the assessment was made in strict pursuance of the power of taxation given by its charter, and in the manner therein provided, and in the ordinances passed to carry it into effect, which have in no wise been exceeded, and that the tax assessed against the bank is at no greater rate than is assessed by the municipal authorities of Mobile, upon other moneyed capital in the hands of individual citizens of said city, and that all the banks organized under the authority of the State and located in the city of Mobile, have been taxed in the same manner, except those exempted from such taxation by their charters, granted by the State before the act of Congress, under which complainant was incorporated. The answer asserts the unconstitutionality of the act of the legislature approved February 27, 1875, restricting taxation upon the shares of National Bank stock, &c., and the right of the corporate authorities to assess the tax complained of. It is admitted that Sheffield, the tax collector, has not sufficient means to respond to a judgment for the amount of the taxes

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involved, and also admits the existence of the statutory mortgage upon the property and revenue of the city (except such as may be necessary for the current expenses of the city government), "but respondents are unable to say whether or not the mortgage debt amounts to more than the revenue which the city can lawfully raise." It also states that the city authorities have power, under the constitution, to assess a tax on property not to exceed two per cent. per annum, and that for the years during which the tax complained of was levied, they have not found it necessary to go to that limit. The return of "*nulla bona*" upon executions against the city is admitted, but it is insisted that this is not evidence of insolvency; as such debts are not expected to be paid from the corporate property, but by *mandamus* to raise sufficient taxes; and, in every case, *mandamus* issued on such judgments to compel satisfaction have been complied with, without reaching the constitutional limit of taxation. It is also averred that, if taxes were wrongfully exacted of complainant, it would have the right to have the money thus collected paid back, before it could be applied to creditors, and that this right could be enforced by *mandamus*, wherefore defendants deny that the Mayor, Aldermen and Common Council of Mobile is insolvent, or that complainant, if compelled to pay said taxes, would be unable, by reason of such insolvency, to recover the money. In the answer was also incorporated a demurrer for want of equity.

The cause was submitted to the court on motion to dissolve the injunction on the denials in the answer, and to dismiss the bill for want of equity.

The Chancellor granted the motion, dissolved the injunction, and dismissed the bill; and this decree is now assigned as error.

J. LITTLE SMITH and JOHN T. TAYLOR, for appellant.—The tax was assessed against the *bank itself* on the value of all the shares of its stock in gross, and not on the several shareholders upon the value of their respective shares. The capital stock of the bank consists of non-taxable bonds of the United States. Such banking associations are treated as financial instruments of the United States government, and the States can only impose taxes in the manner and under the limitations respecting this matter imposed by the acts of congress. These are found in sections 5210 and 5219 of the revised statutes of the United States. Under these, the State itself could not tax the bank as done in this case, and of course it could not delegate power to said city to do so.—2 Black. 631; 2 Wall. 200; 1 Otto. 34; 4 Otto. 417; 9 Wall.

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359; 5 Otto. 22; 3 How. 133. But the State never attempted to confer such power on the city. The city was authorized to pay taxes on the real and personal property situate *within the corporate limits*, and this was copied from a charter enacted before national banking associations had any existence. Its machinery requires an assessment to the owner.—City Charter, §§ 37–38. This is further manifested by the fact that the act of the State legislature delegating the power to tax such shares, contains none of the limitations required by the act of congress. But where the State delegates its power to tax such shares to commissions of assessment, or to municipal bodies, the State law should contain these limitations.—3 Wall. 581; 2 Otto. 417; 9 Wall. 470. For the form of such a law, see 4 Otto. 527. As the bank and not the shareholder was assessed, and as that was unlawful, the tax was laid without any jurisdiction in the city; was void, and was not collectable from the city; and that should settle the questions in this case, except the question of jurisdiction on the part of the Chancery Court.

The case, however, has been argued as if the tax had been assessed against the shareholder, and it was asserted that the bank was liable for this alleged debt of the shareholder. That result cannot be accomplished without a State law to that effect. The general rule is that, for the purposes of taxation, the situs of personal property is the residence of its owner. It is also a general rule that one man is not bound for the debt or taxes of another, and that he cannot become the creditor of such tax-payer by the voluntary payment of his tax, without the tax-payer's request.

The act of February 27, 1875, now embodied in par. 7, a., § 369 of the Code of Alabama, was enacted to accomplish both objects. It allowed assessments where the bank was located, and it provided that the assessment should operate as a lien on the shares assessed, and also as a statutory garnishment on the bank for the payment of the tax.

If that act is constitutional, it *excludes municipal corporations from any power to tax the shares in such Associations*, and destroys any alleged right of the city to collect the tax in this case. It is said to be unconstitutional under the decision in *The Mayor, &c., v. The Stonewall Ins. Co.* That case determined that no discrimination under the tax laws could be constitutionally made in favor of corporations over the rights of individuals. There is no such question here; for the shares of such associations are taxed alike, whether owned by corporations or individuals. It is not, therefore, unconstitutional for that reason.

If the act is unconstitutional, then the only law authoriz-

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ing the State itself to tax such shares is that now codified in Par. 13, of section 362 of the Code of Alabama.

This law, however, does not authorize the collection of the shareholder's debt from the bank, nor does the act of congress provide that municipalities may do so. It simply authorizes State legislatures to provide such machinery for collection, if they think proper to do so. Neither does the State law provide for the assessment of the shareholder, except in the county of his residence. All the provisions of Articles III and IV, of Part I, Title 7, Chapter 2 of the Code, contemplate the assessment of personal property in the county of the owner's residence, and this is the usual rule under the city charter.—*St. John v. Mayor, &c.*, 21 Ala. 227

The case of *McIver v. Robinson*, 53 Ala. 456, was not a case of contest between the tax collector and the bank. The share was assessed to the owner, and was about to be collected by a levy on and sale of his property. Here the bank is improperly assessed, and the attempt is to collect from it.

The case does show that the assessment was made in the county where the bank was located, and not in the county of the shareholder's residence; but the act of February 27, 1875, which authorized this, was not assailed as unconstitutional, and the petition of *McIver* stated the broad proposition that the shares were not subject to taxation by the State or county, and this was the general proposition discussed by the court. In point of fact, the decision cannot be sustained, if the act of February 27, 1875, be held to be unconstitutional, but it is not the same case as that under consideration.

The Chancery Court had jurisdiction of the case.

1. The allegations are, not only, that executions against the city had been returned "no property found," but they aver that its property and its revenues, however it may attempt to raise them within the limits of its power, are mortgaged, so that any further attempt to raise means for refunding an illegal tax could not be made available.

2. The bank could not under the law, as it stood, have legally charged any tax it may have paid to any shareholder, and there was no jurisdiction in the city to assess it for their property. If, therefore, the bank paid it, it could not have been reimbursed, and the attempt would have led to a multiplicity of law suits, all which could be avoided by injunction; without which the injury to the bank would have been irreparable.

See the remarks as to the allegations of the cross-bill, in *Dowe v. City of Chicago*, 11 Wall. p. 112.

3. As the city was without jurisdiction to make the assessment, there was no proper case for application to the court

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of assessment, nor any proper case for proceedings by *certiorari*.—Burrough's on Taxation, p. 439, §§ 142, 143, ch. xxi.

WILLIAM G. JONES, *contra*.

Appellee's brief did not come into the Reporter's hands.

MANNING, J.—The main question—one that has been ably and strenuously argued in this cause—concerns the validity of a taxation by the city of Mobile against appellant, the National Commercial Bank of Mobile, of a certain *per centum* upon the amount (\$350,000) of its capital; appellant being a "national banking association," under the act of Congress "authorizing, providing for the establishment of, and regulating such institutions."

It is through them, called generally "National Banks," that the "national currency," payment of which is guaranteed by the general government, is emitted and kept in circulation. The notes of which this currency consists, designed, engraved, stamped and numbered with the purpose of preventing them from being counterfeited, are obtained from the government by the national banks, upon their depositing in exchange for them and as security for their payment, interest bearing bonds of the United States, to an amount exceeding by ten *per centum* that of the notes received. The amount of the bonds thus used and deposited by any bank must not be less than one-third of its capital, and is generally a much larger proportion, often the whole of it; and those bonds being securities of the United States for money borrowed, are not subject to State or municipal taxation.

The statutes relating to these banks, after enacting that "in lieu of taxes to the United States, *every association* shall pay to the treasurer, . . . a duty of one-half of one *per centum* each half year upon the average amount of its notes in circulation, and a duty of one-quarter of one *per centum* each half year upon the average amount of its deposits, and a duty of one-quarter of one *per centum* each half year on the average amount of its capital stock *beyond the amount invested in United States bonds*,"—further provide, that "nothing herein shall prevent all the *shares* in any association from being included in the valuation of the personal property of the *owner or holder of such shares*, in assessing taxes imposed by the authority of the State within which the association is located; but the legislature in any State may determine and direct the manner and place of taxing all the *shares* of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon

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other moneyed capital in the hands of individual citizens of such State, and that *the shares* of any national banking association *owned by non-residents* of any State, shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of *associations* from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed."—Rev. Stat. U. S. §§ 5214, 5219.

Upon a careful reading of this law, it will be observed that these *associations*, the national banks, are themselves, in their corporate capacity, expressly declared to be subject to impositions for the public revenue, in two cases only: first, in favor of the United States, by the duties to be paid to the treasurer, from which it seems intended that the amount they have invested in United States bonds shall be exempt; and secondly, in favor of each State, upon their real property therein, according to its value. Their liability to this tax upon their real estate was probably conceded in deference to the opinion, hereinafter cited, of the Supreme Court, delivered by Chief Justice Marshall, concerning the sovereign rights remaining in the States over the property within their jurisdiction.

The statute does not, in words, inhibit a State from imposing a tax against the national banks within its borders, on their capital, or any thing else belonging to them; but by expressly recognizing the right of State taxation against them, upon their real estate only, and by providing for such tax against the *shareholders* of the banks upon the value of the shares they may respectively own, it seems to be implied that this is as far as a State may lawfully go in subjecting these associations to such burdens, and the only manner in which they can be imposed. Is this a correct conclusion?

The answer to that question, it seems to me, begins in the great case of *McCulloch v. Maryland*, decided sixty years ago. (4 Wheaton, 316-437.) An act of that State made it highly penal for officers of any branch bank, that might be established therein without its authority, to issue notes of such bank to circulate as money, except upon stamped paper to be furnished by the State, and for which it charged a heavy tax; and *McCulloch*, cashier of a branch in Baltimore of the Bank of the United States, was prosecuted for issuing there the notes of this bank in violation of that law. Webster, Pinckney, and other lawyers of the greatest ability, argued the cause; and the Supreme Court of the United States, through Chief Justice Marshall, after a very able discussion, and laying down a rule with the argument on which it was founded, for determining the subjects that are

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within the reach of State taxation, declared it to be the unanimous opinion of the court, "that the States have no power, by taxation or otherwise, to retard, impede or burden, or in any manner control the operations of the constitutional laws of Congress to carry into execution the powers of the general government;" and because this branch of the Bank of the United States was an agency or means authorized by a constitutional law, through which that government was executing those powers, the act of Maryland laying the tax was pronounced to be null and void. The Chief Justice added: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax, paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State."

The principles of this opinion have been ever since adhered to by the Supreme Court—and have been several times applied in other celebrated cases. In *Osborn v. The U. S. Bank*, (9 Wheaton, 738,) it was upon an elaborate re-argument of the subject, explained why the capacity to issue its own notes as a currency, and do the business of a bank of discount, deposit and circulation, faculties which might be exercised by individuals or corporations wholly unconnected with public affairs,—was considered essential to the vitality and usefulness of the bank of the United States as a government fiscal agent, and why it, therefore, was not taxable in respect of the advantage it derived from the employment of those faculties. In *Weston v. The City of Charleston*, (2 Peters, 449,) a municipal tax upon stock certificates for money obtained by loan, issued by the United States to individuals, and in their hands, was held to be unconstitutional, because it impeded the government in the exercise of its power to borrow money. In 1862, the same principle was reaffirmed and applied in *The Bank of Commerce v. The City of New York*, (2 Black, 620,) in respect to a tax of that city upon the capital of the State banks situated therein; the capital of each being largely invested, in some instances almost entirely, in United States bonds. Again, in the "Bank-tax case," (2 Wallace, 200,) it was decided that a tax of the State of New York on the banks there, "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," was a tax on their property, and that so far as it consisted of stocks of the federal government, the law laying the tax was void. And in *Farmer's National Bank v. Dearing*, (91 U. S. 29,) the Supreme Court say:

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"The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. . . . Against the national will, 'the States have no power, by taxation or otherwise, to retard, impede or burthen, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

Whatever evil, therefore, in the overthrow of State policies, especially in regard to usury, may be apprehended as possible from the unrestrained exercise of such power by the federal government, it appears to be very positively settled by the Supreme Court that a State has no independent authority of its own over the national banks within its borders, as they are now endowed, they being created and employed by Congress as instruments and agencies in the administration of public affairs; and that inasmuch as by taxing them directly, their efficiency and usefulness might be impaired, the several States have no power to lay any burden of this kind upon them, except so far as Congress has made them liable to such jurisdiction, or property belonging to them was previously subject thereto.

What that body has enacted, in this regard, is, that "all the *shares* in any association" may be "included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by the authority of the State within which the association is located," and that "the legislature in any State may determine and direct the manner and place of taxing all the *shares*" subject to two restrictions not affecting this argument. And the act further makes it the duty of the president and cashier of every banking association to "cause to be kept, at all times, a full and correct list of the *names and residences of all the shareholders* in the association, and of the *number of shares* held by each, in the office where the business is transacted," and subject to the inspection of "the officers *authorized to assess taxes* under State authority—during business hours."

But the city of Mobile made the assessment now in question, not against any of the shareholders, but against the bank itself, upon all "complainant's shares in gross, composing its capital stock;" (see paragraph two of answer;) or as the exhibits to the bill show, upon its "capital, \$350,000."

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And it is urged that inasmuch as the capital is composed of the shares, and the shareholders constitute the corporation, a tax upon the capital, or all the shares of the capital in gross, against the corporation itself, is in legal effect the same as a tax against the shareholders severally upon their respective shares. And it seems, indeed, as if there should be practically little difference between the two. Yet Congress, by providing that all the shares of the capital may be included in the valuation of the personal property of their owners or holders for State taxation, and by requiring to this end written or printed lists to be kept for inspection by the tax officers of the names, places of residence and number of shares of these shareholders, appears carefully to have avoided subjecting the banks themselves to State taxation of their capital.

The reasons for this, probably were—first, a desire to prevent any such interference with these instrumentalities for administration, as the old Bank of the United States encountered; and, secondly, views of the subject similar to those on which the decision in *Van Allen v. The Assessors* (3 Wal. 573) is founded. It is there held, that the capital of a national bank belongs to it only in its corporate capacity, not to the stockholders, and that as it consists largely, and often wholly, in United States bonds, by taxing the capital as such, these bonds would necessarily be taxed; which can not in any case be permitted. But the shares, it was further held, of the several shareholders, which the law declares may be included in the valuation of their personal property in the assessment of taxes imposed by or under State authority—although their value may be largely influenced by the new use which the banks were thereby authorized to make of the bonds—did not consist of the bonds. Said Mr. Justice Nelson, for a majority of the court: “The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.” “The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital,” &c. “This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.”

And as a reason why this taxation should not be regarded

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as a tax upon the bonds in which the capital of the bank was invested, and why no deduction should be made on account of them, the learned judge referred to the privileges and powers conferred by the act—"founded upon a new use and application of these government bonds—especially the privilege of issuing notes to circulate in the community as money, to the amount of *ninety per centum* of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the banks." Wherefore, it was held that the tax was properly authorized upon the shares, in respect of these new privileges, and the advantage they conferred upon the shareholder in the increased value he derived therefrom. It might also have been added, that the capital of a bank is generally a fixed sum which does not change; while the shares thereof, in the hands of the shareholders, vary in value according to the condition of its affairs; and the rule now generally enforced by constitutional and legislative enactments, is, that all taxes shall be in proportion to the value of the subject on account of which they are assessed. In *People v. The Commissioners*, (4 Wallace, 244,) the views presented in the above leading case, were reaffirmed; also in *Bradley v. People*, Ib. 459, and in other cases since.

According, therefore, to the terms of the act of Congress and the decisions of the Supreme Court of the United States, the taxes brought into discussion in this cause were not assessed in conformity with or by authority of law.

The defects, however, and errors were rather in the mode of proceeding than in the matter of right. There is no doubt that the shares of the stock in national banks may be lawfully included in the valuation of the personal property of the owners thereof, in assessing taxes imposed by authority of the State, and are as such liable according to their value, to the county and municipal, as well as to State taxes, in the counties, cities and towns in which the banks are respectively located, provided such taxes shall not be heavier than those imposed upon other moneyed capital. Moreover, the president and cashier of every such bank are required to have made out and kept, at all times, in its office for the transaction of business, a list of its shareholders, their places of residence, and of the number of their shares respectively; and it may be made the duty of every such bank to pay for its stockholders the tax legally assessed against their respective shares, whether the stockholders reside in the State of Alabama or not. Contestations upon these points have been made time and again, sometimes by the banks and sometimes by the shareholders, to avoid this liability. But it is estab-

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lished by repeated adjudications, and ought to be considered definitively settled. See upon the subject, *Van Allen v. The Assessor*, *supra*; *People v. Commissioners*, *supra*; *National Bank v. Commonwealth*, 9 Wall. 353, (an interesting case); *Tappan v. Merchants' National Bank*, 19 Wall. 491; *People v. Commissioners of Assessment*, 94 U. S. 415; *Waite v. Dowley*, 94 U. S. 527; *Adams v. Nashville*, 95 U. S. 19; *McIver v. Robinson*, 53 Ala. 456.

It is insisted, however, on behalf of the city of Mobile, that even if the taxes in controversy are illegal, or illegally assessed, complainant's remedy is not in a court of equity by injunction. This is certainly in accordance with our decisions heretofore. The allegations of insolvency against a municipal corporation, which rarely has much property of its own subject to execution, have not the same force as they would have against an individual or private trading corporation. Bodies politic of this public character, established for the local government of communities, raise their revenues, as a State does, by taxation of the people and property within their jurisdiction. Obstructions to the exercise of this right and refusal to pay taxes, are often the chief cause of municipal embarrassments. The averments of the insolvency of the city can not be regarded as affording a sufficient reason why a Court of Chancery should take jurisdiction of a case of this nature, for which there were ample remedies at law, including especially proceedings by *certiorari*.

Let the decree of the Chancellor, therefore, be affirmed.

BRICKELL, C. J.—I concur in affirming the decree of the Chancellor, upon the ground that a court of equity has not jurisdiction to enjoin the collection of the tax. I do not concur in much that was said in reference to the taxation of the shares in national banks.

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Mandamus.

1. *Redemption of lands sold for taxes; how statutes authorizing are to be construed.*—The right to redeem lands sold for taxes is purely statutory; and while such statutes are favorably and liberally construed, courts can not change the mode or vary the circumstances or conditions upon which the statute makes the right depend.

2. *Same; act relating to, approved February 12, 1879, construed.*—The "act
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to authorize the redemption of lands sold for taxes and purchased by the State," approved February 12, 1879, confines the right of redemption, upon the terms therein prescribed, to lands sold between the first day of January, 1866, and the first day of January, 1878, and the office of its fourth section which allows the redemption of parts or parcels of lands "heretofore sold for taxes," without specially confining the redemption to lands sold between the times mentioned in the first section, is to confer the right to redeem part of a tract or parcel of land sold within the prescribed period, without being compelled to redeem the whole tract, and not to extend the right to all lands, no matter when sold.

APPEAL from Macon Circuit Court.
Tried before Hon. JAMES E. COBB.
The opinion states the facts.

ABERCROMBIE, GRAHAM & BILBRO, for appellant.

W. F. FOSTER, *contra*.

BRICKELL, C. J.—The first section of the act, approved February 12, 1879, entitled "an act to authorize the redemption of lands or real estate sold for taxes, and purchased by or in the name of the State," (Pamph. acts, 1878-9, p. 14) provides: "That in all cases where lands, or real estate of any description may have been sold for taxes, and purchased by or in the name of the State, at any time between the first day of January, 1866, and the first day of January, 1878, it shall and may be lawful for the owners of such lands or real estate, his or her agent or duly authorized legal representative, to redeem such land or real estate by paying into the treasury, or to the judge of probate of the county in which such real estate may have been sold and purchased in the name of the State, one-half of the amount of taxes due on said real estate, when such real estate was sold, and, in addition thereto, one-half the amount of all taxes assessed and levied against said real estate since the day of sale, if the same have not been paid, without any penalty or interest," &c. The fourth section reads: "That the owner of any particular piece or tract of land or other realty, heretofore sold for taxes and purchased by the State, or the agent or agents of any such owner, may redeem the same, on paying one-half of the taxes due upon the particular piece or tract of land so sold and purchased by the State, including the taxes for which the land was sold, and also all taxes which have accrued thereon since the date of such sale."

The appellant made application to the judge of probate, claiming the right under these statutory provisions, to redeem the whole of a tract of land, which had been sold on the 6th day of May, 1878, for the payment of taxes, and purchased by the State. The probate judge refused the appli-

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cation, and thereupon, the appellant applied to the judge of the ninth judicial circuit for a *mandamus* to compel the probate judge to receive the money tendered, and issue a certificate of redemption. On a hearing, the judge of the Circuit Court refused to grant the *mandamus*, and dismissed the application at the costs of the appellant. From that judgment, this appeal is taken.

The right of redeeming lands sold for the payment of taxes, whether the purchaser is the State, to whom the taxes are due, or an individual, is derived exclusively from statutory provisions. Such provisions are favorably and liberally construed on the same principle that remedial statutes are beneficially expounded.—*Dubois v. Hepburn*, 10 Pet. 1. But the right must nevertheless be asserted in the mode, under the circumstances, and upon the conditions expressed in the statute. The courts cannot change the mode, or vary the circumstances or conditions, upon which the statute may declare the right shall depend. The first section of the statute, in clear and unambiguous terms, confines the right of redemption to lands which were sold and purchased by the State, between the first day of January, 1866, and the first day of January, 1878. Lands sold anterior to the first day of January, 1866, or subsequent to the first day of January, 1878, are not the subject of redemption under this section. The time of the sale is a material element of the right.

The fourth section of the statute was not intended to vary the circumstances or conditions on which the right of redemption depends, nor to extend it to any other sales, than such as were made within the period of time expressed in the first section. The whole purpose of that section, is to confer the right to redeem a part of a tract or parcel of land sold within the prescribed period, on the terms and conditions expressed; to relieve the owner from liability to redeem the whole tract, and to relinquish the right of the State to the part redeemed. If the fourth section was construed as authorizing the redemption of all lands at any time sold for taxes and purchased by the State, it would be repugnant to and inconsistent with the first section. In effect, it would as to the time of the sale, abrogate that section. But when construed, as simply authorizing a redemption of any particular part of a tract or parcel, sold within the period prescribed, or the terms expressed, it is consistent with, and an additional provision to the first section. No rule for the construction of statutes, is more uniformly observed than that which requires that they be so construed, that one part or clause shall not frustrate or destroy, but shall harmonize with and support another.

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The appellant, by his application, showed he did not have the right of redemption claimed, and the circuit judge properly refused the *mandamus*.

Affirmed.

Harris v. Swanson & Bro.

Action to recover Statutory Penalty for failure to enter Satisfaction on Record of Mortgage.

1. *Plaintiff; who is necessary.*—Where the legal interest in a cause of action, whether arising out of contract or *ex delicto*, is joint, residing in several persons, all who are living must join in an action founded on it. In such case, however, one or more of the parties may commence and prosecute the action in the name of all, or bring them in by amendment, whether willing or not, upon indemnifying them against costs.

2. *Indemnity; what sufficient.*—It is the duty of the court, when indemnity is demanded, to see that proper security is given, and to allow the party using the name of the others, time to give such indemnity; but when a party is satisfied with the indemnity offered, the duty of the court in this respect is ended, and it cannot exact other indemnity, or refuse to proceed with the cause until it is given, or refuse an amendment making such person a party until further indemnity is given.

3. *Amendment; what should be allowed.*—One of two joint mortgagors cannot maintain an action in his own name against the mortgagee, to recover the statutory penalty for refusal to enter satisfaction, if his co-mortgagor is living; and when the action is commenced by one, an amendment joining the co-mortgagor as plaintiff should be allowed; and if the plaintiff offers indemnity to the co-mortgagor, with the sufficiency of which he is satisfied, the court cannot refuse the amendment or exact other indemnity, because such mortgagor is unwilling, for personal reasons, to join in the suit.

APPEAL from Macon Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellant, M. H. Harris, commenced this action against the appellees, M. B. Swanson & Brother, to recover the statutory penalty for their failure to enter satisfaction on the record of a mortgage, for more than three months after payment and request to enter satisfaction. It was alleged that the mortgage was executed by the plaintiff and one Wright, who were then engaged in a planting partnership, but that all the property covered by it, except the crop raised that current year, was the personal property of the plaintiff. A demurrer for a non-joinder of Wright as party plaintiff having been interposed and sustained by the Circuit Court, the plaintiff offered to amend by making Wright a co-plaintiff, and tendered to said Wright indemnity for all costs and expenses of suit. It was shown that the security ten-

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dered was ample. The court then asked said Wright if he was willing to be made a party on the indemnity offered him by the plaintiff. Wright objected to being made a party plaintiff. The plaintiff then offered to show to the court by said Wright that he did not object to the character or sufficiency of the indemnity, but objected on personal grounds. The defendant objected to this testimony, the court sustained the objection and refused to allow plaintiff to make the proposed amendment, or to compel said Wright to allow himself to be made a party plaintiff, except upon conditions which the plaintiff refused to comply with, and plaintiff excepted. There was a judgment on demurrer for the defendants, and the plaintiff brings the case here by appeal.

BREWER & BREWER, for appellant.

ABERCROMBIE, GRAHAM & BILBRO, *contra*.

BRICKELL, C. J.—It is an elementary principle, that when the *legal interest* in a cause of action, whether it arises out of contract, or is *ex delicto*, is joint, residing in several persons, all who are living must join in the action founded on it. One or more of the parties may use the name of all in the commencement and prosecution of the action. If others are unwilling to join in the prosecution, the unwillingness does not authorize a dismissal of the suit. They can and will, on a proper application, be protected by an indemnity against costs, from those prosecuting the suit. All courts have an inherent power to protect themselves and their suitors from an abuse of their process, and to protect the rights and interests of those who have beneficial interests in the subject matter of suits. In *Cunningham v. Carpenter*, 10 Ala. 109, one of the several partners instituted a suit at law in the name of the partnership, and another partner came in and proposed to dismiss the suit so far as he was concerned. The dismissal, if allowed, would have been fatal to the suit. This court said, there would be no substantial difference between allowing a partner to extinguish a partnership debt with his individual debt and allowing him to interfere with a suit his partner had commenced, *especially when the offer was made to secure him against costs*.

The statute authorized the amendment of the complaint, by the insertion of the name of Wright as a plaintiff. When the complaint was amended, Wright, if unwilling to join in the prosecution of the suit, could have demanded from Harris indemnity against the costs, and a reasonable time should have been allowed to furnish it. It was tendered im-

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mediately, however, and with its character and sufficiency Wright was satisfied. Being satisfied, his personal unwillingness to prosecute the suit is immaterial, he is not bound if it results in a judgment favorable to Harris and himself, to participate in its fruits; but he is without power to arrest or impede the prosecution of the suit. The indemnity being satisfactory to Wright, it was not the province of the court to require that any other should be given in lieu of it. It is for his personal protection the indemnity is required, and when such is tendered as he is satisfied with, the court is without further power in the premises.

Reversed and remanded.

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Action on Account.

1. *Rulings of lower court; what not revisable.*—The appellate court will not revise rulings of the primary court upon motions for the continuance of causes, or motions to set aside judgments and grant new trials.

2. *Rules of practice; what proper.*—The circuit court may properly make a rule requiring written pleading in causes then pending for trial, to be filed with the clerk by the first day of the next term, and in all suits thereafter brought within the time prescribed by law for pleading, and in event of a failure thus to plead, that judgment by default or *nil dicat* should be rendered, on motion of plaintiffs, disregarding "pleas in short by consent," unless written consent be endorsed and filed with such pleas.

APPEAL from Lee Circuit Court.

Tried before Hon. JAMES E. CABB.

The facts are stated in the opinion.

G. W. GUNN, for appellant.

J. R. DOWDELL, *contra*.

MANNING, J.—The presiding judge of the circuit court of Lee county, at the term thereof next before that at which the judgment in this cause was rendered, had given notice, and caused to be set forth in a rule of the court entered on the minutes, that in all cases then pending in the court, written pleadings must be filed with the clerk on or before the first day of the next term; and that in all suits thereafter brought, written pleadings must be so filed within the time prescribed by law for pleading; and that in the causes in which written pleas were not filed as required, judgments

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by default or *nil dicit* would be entered, on motion of plaintiffs; and that "pleas in short by consent" would be disregarded and taken from the file, on motion, unless the written consent of parties should be indorsed on, or filed with such pleas. We can not doubt that these were judicious as well as legal regulations, adopted by a magistrate intent only upon faithfully performing his duty of administering the laws, and who had found that the interests of society demanded of him a stricter enforcement of the rules of practice.

In this case, there was a failure to comply with them; in consequence of which it happened, in the absence of the defendant and his counsel, that when the cause was reached a day earlier than that which, on his docket, the clerk had set for the hearing of it, judgment *nil dicit* was rendered in favor of plaintiffs, and a writ of inquiry executed ascertaining the sum they should recover of defendant. No plea was then filed.

On the next day, defendant's counsel appeared, and, upon affidavits which fail, we think, to show a good ground of defense, moved the court to set aside the judgment rendered, and permit him then to interpose a plea and controvert plaintiffs' claim; which motion the court overruled. Thereupon, defendant obtained a bill of exceptions, and appeals to this court to reverse the action of the Circuit Court on this motion.

It is the settled practice of this tribunal not to revise or set aside the rulings of the primary courts upon motions for the continuance of causes, or motions to set aside judgments and grant new trials. And no sufficient reason is shown why we should, if we might, do so in this instance.

Let the judgment of the Circuit Court be affirmed.

Renfro & Andrews v. Adams.

Suit to recover Statutory Penalty for Failure to enter Satisfaction of Mortgage, after request, &c.

1. *Partnership; what sufficient notice to.*—Notice, or request, to each of the members of a partnership, who are mortgagees, is not necessary to render them jointly liable to the aggrieved party, for the statutory penalty for failure to enter satisfaction of a mortgage; notice or request to one is notice or request to all.

2. *Mortgage; statutory penalty for failure to enter satisfaction. what not essential*
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to recovery of.—It is not essential to the recovery of the statutory penalty for failure to enter satisfaction of a mortgage (Code, § 2223,) that the mortgagee's failure should have been wilful or intentional; although not wilful or intentional if it resulted from mere inadvertence, inattention or indifference, the penalty is incurred.

Quere.—Whether physical or mental incapacity to comply with the request would not be a defense.

APPEAL from Lee Circuit Court.

Tried before HON. JAMES E. COBB.

The appellee, William G. Adams, brought this action against the appellants, Renfro & Andrews, to recover the statutory penalty for their failure to enter satisfaction, on the record, of a mortgage made by him to them, for more than three months after the payment of the debt secured thereby, after demand, &c.

The complaint "claims of the defendants the sum of two hundred dollars due from defendants to plaintiff by reason of a failure on the part of the defendants, within three months after being requested by the plaintiff to enter satisfaction on the margin of the record of a certain mortgage executed by the plaintiff and his wife, Ida Adams, to defendant, on the 13th day of December, A. D. 1875, and recorded in book 'N,' in the Book of Records and Conveyances, p. 70, in the office of the judge of probate of Lee county, Alabama, conveying to defendants two large sorrel mare mules, one medium sized mouse colored mare mule named 'Tobe,' one medium sized mare mule named 'Nell,' one two-horse wagon, thimble-skeined, from the Indianapolis works, and one lot of land with two roomed cabin thereon, situated in the city of Opelika, described as follows: 'Lot number five (5) on R. H. Johnston's tract of land, section twelve (12), township nineteen (19), range twenty-six (26), to secure the payment of a certain promissory note for three hundred and twenty-five dollars, made by plaintiff and William Youngblood, bearing even date with said mortgage; said defendants, being the mortgagees in said mortgage, having received full payment and satisfaction of the amount secured by the mortgage from plaintiff."

This complaint was demurred to, on the grounds, 1st. That said complaint showed no sufficient or legal cause of action. 2d. That said complaint does not aver that payment and satisfaction of said mortgage was made before request of satisfaction by plaintiff. 3d. Said complaint does not show, with sufficient certainty, the identity of said mortgage. These demurrers were overruled. The defendants then filed the following pleas: 1st. The general issue. 2d. That they had not failed in manner and form as alleged in the complaint. 3d. That the act of failure to enter satisfaction of

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said mortgage on said record was by mere inadvertence and unintentional, and that it was left unsatisfied, if so at all, by mere mistake and accident. 4th. That plaintiff never requested satisfaction of said mortgage. 5th and 6th, were personal pleas by the defendants separately, that they had not been requested to enter satisfaction of the mortgage. A demurrer was interposed to the third plea, on the ground that it furnished no answer to the complaint; and to the fifth and sixth pleas, on the ground that they were an answer to only part of the complaint. These demurrers were sustained.

It was in evidence that no request had ever been made to Forney Renfro, one of the defendants, to satisfy the mortgage. There was evidence tending to show that the failure to satisfy the mortgage on the record, was not wilful or intentional, but a mere inadvertence, accident or mistake, and from no intention to refuse or fail to do so on the part of the defendants. It was shown that the plaintiff did request Joseph Andrews, one of the defendants and a member of the firm of Renfro & Andrews, to settle said mortgage on the records, and that said Andrews consented to do so in December, 1876, and again on the 14th day of April, 1877, and that on the 19th of that month the record was marked satisfied.

This was, in substance, all the evidence, and the defendants requested the following written charges: 1. That before the plaintiff can recover in this action, the jury must believe, from the evidence on the stand, that there was more than mere inadvertence to satisfy the record on the part of the mortgagee. 2. That if the jury believe, from the evidence, that the defendants failed to satisfy the mortgage on the record from a mere mistake, or accident, then they must find for the defendants. 3. The failure to satisfy the mortgage on the record, must be a wilful failure, or the verdict must be for the defendants. 4. The failure to satisfy the mortgage on the record, must be knowingly done, or the defendants are entitled to a verdict. 5. The failure to satisfy the mortgage must be such a failure as amounts to a refusal to satisfy, or the defendants are entitled to a verdict. The court refused to give each of said charges, and the defendants separately excepted. There was a verdict and judgment for the plaintiffs, and the defendants bring the case here by appeal, assigning as error the various rulings to which exceptions were reserved.

W. J. SAMFORD, for appellants.

J. R. DOWDELL, *contra*.

[South & North Alabama Railroad Co. v. Pilgreen.]

BRICKELL, C. J.—The action was brought to recover the penalty of two hundred dollars, which is imposed by § 2223 of the Code, upon any mortgagee who fails, on the request of the mortgagor, for three months, to enter on the record of the mortgage satisfaction thereof, after the payment of the mortgage debt.

Several objections to the complaint are made by demurrer, which we do not think are well taken. The facts necessary to support the action, are presented in an intelligible form and with clearness. The material questions seem to be, whether notice or a request to each of the mortgagees, who were partners, to enter satisfaction of the mortgage, was necessary to render them jointly liable for the penalty; and whether the failure to enter satisfaction must not have been wilful and intentional, before the penalty is incurred. These questions must be answered negatively.

The general rule resulting from the unity of a partnership, is, that when notice or a request is necessary to fix its liability, it may be given to the one, and is notice or request to all the partners.—*New York & Alabama Con. Co. v. Selma Savings Bank*, 51 Ala. 305.

The failure of the mortgagee, whether wilful, intentional, or merely negligent or inadvertent, subjects him to liability for the penalty. It is against his negligence or inadvertence, as well as his wilfulness, the statute intends to protect the mortgagor, or the party aggrieved. Whether there may not be circumstances which would relieve him from liability, such as his physical or mental inability to comply with the request, it is not necessary to consider. But when the failure is the result of mere inadvertence or inattention, or indifference, the penalty is incurred. The rulings of the circuit court were in accordance with these views, and its judgment is affirmed.

South & North Alabama Railroad Co. v. Pilgreen.

Action for Stock killed.

1. *Railroad; ownership of trains running on.*—Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road.

2. *Evidence; what sufficient to justify recovery against railroad company.*—In an action to recover damages for injuries to live stock, inflicted by a train run

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on defendant's road, the plaintiff is not required to prove affirmatively that the train was controlled by defendant; in the absence of any evidence to the contrary, the jury is authorized to find the train was so run.

3. *Certiorari*; when refusal of not ground for reversal. — A refusal to award a *certiorari* to a justice of the peace to send up the original papers, together with the statement required on appeal to the circuit court, is not ground for reversal, when it appears from the whole record that awarding the writ would not have affected the result; the appeal bond being sufficiently formal to give jurisdiction, and it not being stated that the original papers would show a departure in the circuit court, or any other reason shown why the writ should have been granted.

APPEAL from Shelby Circuit Court.

Tried before Hon. JOHN HENDERSON.

This was an action, commenced before a justice of the peace by the appellee, Susan A. Pilgreen, against the appellant, the South & North Alabama Railroad Company, to recover the value of certain cattle alleged to have been killed on the road of appellant. On the trial, it appeared that the justice of the peace had not sent the original papers to the Circuit Court to which the case had been appealed, nor did he sign the statement of the case and judgment rendered, which he sent up. The bond filed on appeal from the judgment of the justice is regular in form, recites the parties to the suit, the amount of the judgment, its date and by whom rendered, and is conditioned to prosecute the appeal to effect, and pay and satisfy such judgment as the circuit court should render on the trial of the cause on appeal. The appellant moved in the circuit court for *certiorari* to be directed to and served on the justice who tried the case, directing him to send up all the original papers in said cause, together with a statement signed by him of the case, and judgment rendered therein; which motion the court refused, and appellants excepted. The plaintiff introduced evidence tending to show that the stock, for whose killing this suit sought to recover damages, were found dead on or near the road bed of the South & North Alabama Railroad, near a place known as "Mud Cut," below Calera station, on said railroad; that there was blood on the track, and that the stock bore evidence of having been killed by a train of cars; and that they were the property of plaintiff. This was all the evidence; and the appellant asked the court to give the following charge: "That before the plaintiff can recover of the defendant in this case, the jury must be satisfied from the proof that the defendant had control of the train of cars which did the killing, and that those running the train of cars at the time of the killing, were the agents and employes of the defendant, and if they find there is no proof or evidence upon this subject, then they must find for the

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defendant. This charge the court refused to give, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant brings the case here by appeal, assigning as error the refusal to grant the motion for a *certiorari*, and to charge as requested.

RICE, JONES & WILEY, for appellant.

JOHN T. HEFLIN, *contra*.

STONE, J.—Railroad companies are private corporations, and their road bed and track are private property. They are of too general use for the courts not to know generally their *modus operandi*. They are not highways for public travel, but are private ways, along which no person is authorized to travel, except by permission or toleration of the owner of the road. A person found upon the track, except for the purpose of crossing, and at a public crossing, may be warned away, and, refusing to get off, may be removed by all the means the owner of a freehold may employ to eject an intruder upon his possessions.—*Tanner v. Louisville & Nashville Railroad Company*, 60 Ala. 621. We judicially know that trains on a railroad, as a rule, are run, directed, and controlled under the authority of the owner of the road. Possibly trains of other roads might pass over the track; but this would be an exceptional case, dependent on agreement outside of the general rule. There is no proof in this record that the train which probably did the injury was being run under any other direction than that of the railroad corporation; and, if necessary to the decision of this case, we will presume the South & North Alabama Railroad Company was running and controlling the train which, it is alleged, caused the damage. The charge asked and refused ignores this presumption, and asserts the proposition that if there is no proof or evidence that the defendant [the railroad corporation] had control of the train of cars which did the killing, then the jury must find for the defendant. The charge was rightly refused.

The appeal bond in this case was very full and formal. It recites the parties to the suit, the date and amount of the judgment, and by whom rendered. The proceedings and judgment in the circuit court are in the names of the same parties, and the judgment is for the same sum. The appeal bond does not show what was the cause of action relied on in the court below. Our statutes of jeofails, relating to appeals from justices' judgments, are exceedingly liberal.—Code of 1876, sections 3121, 3126, 3156. Under our rulings,

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any error or informality before the justice of the peace, becomes immaterial when the cause is appealed to the Circuit Court, unless it involves an entire change of parties, or a change of the cause or form of action.—*Davis Avenue Railroad Co. v. Mallon*, 57 Ala. 168; *Glaze v. Blake*, 56 Ala. 379. When an appeal is taken from a justices' judgment to the Circuit Court, the statute requires the justice to return to that court all the original papers in the cause, together with a statement, signed by him, of the case, and the judgment rendered by him. In the present case, the justice did not return the original papers, nor did he sign the statement he sent up, of the case, and the judgment rendered. In this he did not conform to the mandate of the statute. The exception of the appellant is to the ruling of the Circuit Court, in refusing to award a certiorari to the justice, to procure from him the return the statute requires. It was not stated to the court that the return would show any departure in the Circuit Court from the proceedings before the justice; nor was any other reason given, why the writ of certiorari was moved for. The appeal bond, with its recitals, gave the Circuit Court jurisdiction of the cause, showed there had been no change of parties, and showed every thing else that could be alleged against the regularity of the justice's proceedings, except as to the cause of action relied on before the justice. This, as we have said, was no where shown or asserted to have been departed from in the Circuit Court; and considering the entire record, we think it is affirmatively shown that the issue of, and return to the certiorari moved for, could not have affected the result of the trial. We hold, therefore, if there was any error in proceeding to trial in the Circuit Court, in the absence of such return as section 3655 of the Code requires the justice to make, it was error without injury.

Affirmed.

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Settlement of Estate in Probate Court.

1. *Dower ; what excludes wife from.*—At the common law, gifts or devises to the wife by the husband, did not operate to exclude her dower, unless such intent was expressed or the incompatibility of dower and the gift or devise was clear or manifest ; but our statutes have changed this common law principle, and the presumption now is, that a gift, bequest or devise to the wife is

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intended to exclude her not only from dower, but the share of the personal estate to which she is entitled under the statutes of distributions, unless the contrary is expressed or clearly appears from the will.

2. *Dissent from will; effect of, under the statutes.*—Under our statutes, the effect of the widow's dissent from the provision made for her in the husband's will is to blot them out of the will, and leave them as if from death or any other cause she had become incapable of taking; and whatever she renounces, of necessity results to the indemnity of those who are injured by her renunciation.

3. *Will; construed.*—Testator, by will, devised and bequeathed all his estate to his wife and infant daughter jointly, and on the death of either, the survivor to take the whole, and on the death of both, remainder to the legal heirs of the daughter. The wife dissented from the will, and elected to take dower and share in his personal estate, as though testator had died intestate. *Held*—1. The daughter became entitled to the remainder of the estate for life, taking a life estate only, and her legal heirs take at her death by purchase and not by descent. 2. The probate court cannot order money in the hands of the testator's personal representative to be paid over to her and discharge him from liability; a court of equity alone has jurisdiction to give the daughter the option of taking the money, upon proper refunding bond, or to loan it on interest, the interest being paid to her annually during life.

APPEAL from Sumter Probate Court.

The opinion states the facts.

THOMAS COBBS, and SMITH & CHAPMAN, for appellants.

COOKE & LITTLE, and THOMAS B. WETMORE, *contra*.

BRICKELL, C. J.—Nathaniel P. Dean, by his last will, devised and bequeathed all his estate to his wife and infant daughter jointly, and on the death of either, the survivor to take the whole, and on the death of both, remainder to the legal heirs of his daughter. The wife dissented from the will, and elected to take dower, and the share of the personal estate, to which she would have been entitled if the testator had died intestate. On the final settlement of the appellee, Hart, as administrator with the will annexed, of the testator, there was ascertained to be in his hands for distribution, ten thousand five hundred and one and eighty-nine one hundredths dollars. That the widow was entitled to one-fifth of this sum, was not controverted, and it was decreed to her by the court of probate. The appellant, Fannie N., claimed the remaining four-fifths, under the gift by the will to her and her mother. The next of kin of the testator, insisted said Fannie N. was entitled to one-half only of the sum for distribution, and after deducting it and the widow's share, as to the remainder, the testator had died intestate, and it was distributable to them. The court of probate so decreed, and from that decree this appeal is taken.

The common law principle was that gifts or devises to a wife by a husband, did not exclude the wife from dower, un-

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less the intent to exclude her was expressed, or the incompatibility of dower and the gift or devise was clear and manifest. Dower was regarded as a right conferred and favored by law, paramount to the will of the husband, beyond his power of disposition, and a gift or devise proceeding from the volition and bounty of the husband, was deemed rather as a cumulative provision for the wife than as a satisfaction of her clear legal right. The statutes of this State have reversed this rule of the common law, and the presumption under their operation is, that a gift or bequest or devise to the wife, is intended to exclude her, not only from dower, but from the share of the personal estate to which she is entitled under the statute of distributions, unless it is expressed, or clearly appears from the will, that the gift, or bequest, or devise, was intended as cumulative to dower, and the right of distribution.—*Green v. Green*, 7 Port. 19; *McLeod v. McDonnell*, 6 Ala. 236; *Hilliard v. Benford*, 10 Ala. 977; *Vaughn v. Vaughn*, 30 Ala. 329; *Adams v. Adams*, 39 Ala. 274.

The statute, however, confers on the widow a right of election—the right to take of her own choice the gift, or bequest, or devise, made to her by the will of the husband, or dower, and her share of the personal estate, under the statute of distributions. It is simply required that in a particular mode, and within a prescribed period, the election shall be made manifest. Within twelve months after the probate of the will, she may deposit with the judge of probate her dissent, in writing, from the provisions of the will of the husband, and her right of dower, and to distribution, remains as if her husband had died intestate.—Code of 1876, §§ 2292–93.

The effect of her dissent, is simply to annul the provisions of the will in her favor—to blot them out, and leave them as if from death or any other cause, she had become incapable of taking. The statute does not contemplate that it shall in any other respect disappoint and nullify the arrangements of the will, destroy the rights it confers, or that it shall create new and distinct rights in those who are strangers to the will. The whole purpose of the statute is accomplished, when she obtains that which the law would have given her if her husband had died intestate. Whatever she renounces, of necessity results to the indemnity of those who are injured by her renunciation.—2 Lomax on Ex'rs, 349; *McReynolds v. Couts*, 9 Grattan, 242. In the present case, if the widow had died instead of dissenting from the will, the whole estate would have passed to the daughter. This is the express provision of the will. The widow renouncing the provision made for her by the will, and taking dower, and a

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distributive share of the personal estate, the daughter became entitled to the remainder of the estate for life.

The daughter takes a life estate only; her *legal heirs* take, at her death, by purchase, and not by descent. The court of probate cannot order the money paid to her, and discharge the administrator from liability. A court of equity alone has jurisdiction to give the daughter the option of taking the money upon the execution of a bond with sureties to repay it on her death, or to loan it on interest, the interest being paid to her annually during life.—*Mason v. Pate*, 34 Ala. 379.

The decree of the court is affirmed so far as it distributes to the widow a fifth of the moneys in the hands of the administrator. So far as it makes distribution of the remainder, it is reversed and the cause remanded. The appellees, other than the administrator, must pay the costs of this appeal in this court, and in the court of probate.

Darden, Adm'r, v. Reese.

Exemption to Widow from Estate of Deceased Husband.

1. *Exemption to widow; what she may claim as.*—Under the act of April 23, 1873, regarding exemptions, the widow, upon the death of the husband, has the same unqualified right which he had, to select in addition to the property specifically exempt, any other property, so long as it does not exceed one thousand dollars in value; and she may select money on hand at the husband's death, or *chooses in action* due him, and when thus selected, the personal representative must turn such property over to her.

2. *Same; what does not diminish.*—It is now settled that the exemptions which this statute allows the widow from her husband's estate, are not to be diminished, because she owns a statutory separate estate.

APPEAL from Chambers Probate Court.

Tried before HON. PETER M. ROWLAND.

James E. Reese, the husband of the appellee, Lucy A. Reese, died on the 2d day of July, 1876, and at the time of his death, was a resident of Chambers county, in this State. He was childless, and he left personal property valued at four thousand dollars, consisting mainly of notes and accounts. The appellant, W. C. Darden, was the administrator *de bonis non* of his estate, which was then being administered in the Probate Court. It was shown that no exemption of personal property had ever been set apart to the appellee, who was shown to have a statutory separate estate, of the value of ten or fifteen thousand dollars. On the 28th

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day of April, 1877, the appellee selected certain notes which had belonged to James E. Reese, as exempt to her, and reported her selection to the Probate Court, which, without opposition, was confirmed on the 11th of June, 1877. On the 13th of September, she filed a petition for the appointment of commissioners to set apart her exemption, which recites the above facts, and asks that the property selected by her be set apart to her as her exemption. Notice of this petition being served on the appellant, he appeared and demurred to the petition, on the ground—1. That it failed to show that petitioner was a distributee of the estate of his intestate, or in any way entitled to any distributive part of said estate. 2. That the petition failed to show that the property claimed is so claimed as exempt from administration for the payment of debts. These demurrers were overruled. The appellant then filed a plea, setting up as a bar to the relief prayed, that the petitioner was the owner of a statutory separate estate of greater value than the estate of her deceased husband. On the hearing of the petition, the Probate Judge ruled that the petitioner was entitled to have one thousand dollars of personal property exempted from administration for her benefit, and appointed commissioners to set apart and appraise the same to her.

These commissioners having assessed and set apart to her the property previously selected by her, the Probate Court confirmed their report and ordered the administrator to turn over the selected property, and taxed him with the costs. From that order he appeals to this court.

BARNES & HOLMES, for appellant.

ROBINSON & DENSON, *contra*.

BRICKELL, C. J.—The act of April 23, 1873, (Pamph. Acts 1872–3, p. 66,) of force at the death of the husband, and under which the exemption of personal property was claimed by the appellee, had for one of its most material purposes, the execution, or providing a well-defined mode of executing the constitutional provisions declaring exemptions of property from liability to pay debts. Specific personal property was exempt, and in addition, following the language of the constitution, “such other personal property to be selected by the owner, as does not exceed in value one thousand dollars.” The 12th section extends the exemptions of personal property to the widow, or child or children, under twenty-one, on the death of the owner, and allows them additional exemptions of enumerated property. The property so ex-

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empt, not only that specially enumerated, but that which may be selected or set apart to the widow or children, if the selection is not made by or for them, it is expressly declared, "shall be turned over to the family, forever free from administration on the death of the deceased."

A right of selection, as unqualified and absolute as that of the husband while living, is conferred on the widow by the 13th section of the act. From all the personal property of the husband, she may select that which she will take, in addition to the property specially enumerated, if in value it does not exceed one thousand dollars. There is no indication of a purpose to confine her to any kind or species of personal property. Money, if on hand at the death of the husband, or choses in action due to the husband, she may select, and on selection, the personal representative must turn them over to her.—*Ex parte Reavis*, 50 Ala. 210.

We regard it as settled by our former decisions, that the exemptions the statute allows a widow from the estate of her husband, are not to be diminished because she owns a statutory separate estate.—*Chisholm v. Chisholm*, 41 Ala. 327; *Johnson v. Davenport*, 42 Ala. 317; *Jordan v. Strickland*, *ib.* 315; *Thompson v. Thompson*, 51 Ala. 493.

Affirmed.

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Action on Promissory Note.

1. *Promissory note; what will not defeat recovery on.*—The purchaser at an administrator's sale of land, cannot defeat a recovery on the purchase-money notes, or rescind, because a person interested in the estate, but with whom the administrator had no connection, employed a person who was obnoxious to the purchasers to bid against them, by reason of which and the desire of the purchasers to keep such person out, the purchasers bid more than the value of the land.

APPEAL from Randolph Circuit Court.

Tried before Hon. JOHN HENDERSON.

The opinion states the facts.

CICERO D. HUDSON, and JOHN T. HEFLIN, for appellants.

SMITH & SMITH, *contra*.

MANNING, J.—Appellants being sued upon a note they

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had executed to appellee, Wood, as administrator of the estate of one Nunn, for one of the instalments of the price of some land of said estate sold by Wood in the course of administration, pleaded that the note had been fraudulently obtained of them through the procurement by Wood and one Gay who was interested in the estate, of a puffer to bid against the defendants who purchased the land and to run up the price of it against them—and that upon learning this fact, they desired and offered to rescind the contract of sale and to deliver possession of the land to Wood. A demurrer to this plea was overruled, and issue joined upon it. Testimony was introduced which tended to show that Gay had engaged a person to bid against defendants who was obnoxious to them, and that to keep him out they had bid for the land more than it was worth. Upon motion of plaintiff, the evidence to this effect, which was substantially all that was offered for the defense, was ruled out and not permitted to be regarded by the jury. To which action of the court defendants excepted.

We think there was no error in the ruling of the Circuit Judge. Wood was acting as administrator, and it did not appear that he had taken any part whatever in procuring Davis to act as puffer. The only thing proved showing that he had any knowledge that Davis intended to bid for the land was a communication made to him by Gay just before the auction began, that "Davis would make said land bring four thousand dollars, or have it." Nothing in the evidence excluded implicated Wood in any engagement of Davis to run the price up against the purchasers; and therefore, if for no other reasons, there was no error in the ruling of the judge below.

Let the judgment of the Circuit Court be affirmed.

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Trespass Quare Clausum Fregit.

1. *Plea; motion to strike from files, when action of court on revisable.*—The refusal to strike out a plea which is merely defective, not a nullity, is not revisable on error, as the primary court may, in its discretion, refuse to entertain the motion, and put the party to his demurrer; but the rule is different when the court entertains the motion and improperly strikes out the plea, if exception is taken.

2. *Trespass quare clausum fregit; what possession will support.*—In trespass quare clausum fregit, though the title may be, and is often drawn in ques-

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tion, the gist of the action is injury to the plaintiff's possession, and he is not bound to show title ; possession will support the action against a stranger or wrong doer.

3. *Evidence ; what inadmissible.*—Where the plaintiff's possession and the trespass complained of were subsequent to his discharge in bankruptcy, and the title of plaintiff is not involved, a plea of his bankruptcy is frivolous ; though if the title had been involved, and it had become necessary for plaintiff to show title in himself at the time of the bankruptcy, the schedules filed with the plaintiff's petition would be relevant evidence, to show that the premises in dispute, if embraced in them, passed by operation of law to another ; or, if omitted, to present that fact for the consideration of the jury.

4. *Same.*—A judgment in ejectment, or in the statutory action in the nature of ejectment, binds only parties or privies ; it is not evidence against strangers, and a party in possession at the time of the commencement of the suit who is not made a defendant, is a stranger to the judgment, and cannot be affected by it.

5. *Writ of possession ; what not sufficient execution of.*—A plaintiff in whose favor a writ of possession issued, rode around the lands with the sheriff, who said to him : "Here is your land, I put you in possession ;" but tenants who were in possession were not dispossessed, nor was any notice given them to yield possession. *Held* : This was not an execution of the writ of possession.

APPEAL from DeKalb Circuit Court.

Tried before Hon. LOUIS WYETH.

This was an action of trespass *quare clausum fregit*, brought by the appellant, John M. Lankford, against the appellee, Anthony B. Green, to recover damages for a trespass upon a certain piece of land. The summons in the case was executed on the 2d day of February, 1871. On the 16th day of March, 1875, by permission of the court the defendant filed a plea, which set up "that before the commencement of the suit the plaintiff had been adjudged a bankrupt, and that all his property and rights of actions, including the subject matter of this suit, was by decree of the District Court of the United States sitting in bankruptcy, passed to his assignee." Thereupon the plaintiff moved to strike the plea from the files, as being a plea in abatement. The court refused the motion, and plaintiff excepted. Plaintiff then moved the court to strike the plea from the files, because of its insufficiency as a plea in bar. This motion the court also overruled, and the plaintiff excepted. There is a demurrer to the plea incorporated in the record, but the ruling of the court on it is not shown by the judgment entry. There was a replication "that the cause of action arose subsequent to the discharge of the plaintiff in bankruptcy, and issue joined on this replication."

On the trial, the plaintiff introduced evidence tending to show that he had been in possession of the land upon which the alleged trespass was committed, "cultivating and controlling the same for many years, excepting a few years during the late war, when he removed to Cherokee county ; that he

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returned to his former residence in 1865 and cultivated and controlled the said lands until the latter part of 1870 or the early spring of 1871, when the defendant caused some fencing to be removed from said land and taken upon another tract of land, claimed or owned and in possession of defendant, and left the field formerly cultivated open and unfenced, and that stock, cattle and hogs entered upon said lands and committed depredations on some fodder which was stacked up, and destroyed about one acre which was sown in wheat."

Plaintiff testified that he had entered the lands trespassed upon from the United States about thirty years before, and had possession up to about Christmas, 1870, when the trespass complained of was committed, and that since that time the defendant had held possession of part of the land. Plaintiff then read to the jury his final discharge in bankruptcy, dated on the 4th day of June, 1870.

The defendant then offered in evidence the record of an action of ejectment, concerning the lands trespassed upon, in which he was plaintiff and Mary Lankford was defendant, and of a writ of possession issued in that cause. The plaintiff objected to this evidence, the court overruled the objection, admitted the evidence, and the plaintiff excepted. It was shown that the judgment in the ejectment suit was rendered *nil dicit*. The writ of possession was returned executed by the sheriff. The evidence shows that the only execution of the writ was as follows: The sheriff came to Green's house, and in company with him, and having the writ in his possession, they rode through or near the land on the — day of May, 1870, and that while on the land the sheriff said to Green, "Here is the land; I put you in possession under the writ," and then rode away. It was in evidence that some portions of the lands were in cultivation by different parties, who had crops growing thereon; that Green and the sheriff saw no one as they passed through the lands; gave no notice to any one, and put no person out of possession; that they did not see the plaintiff at the time, and gave him no notice. This was all the possession the defendant ever had, until the trespass complained of. It was also shown that a few days after the sheriff put Green in possession, one of the plaintiff's tenants, who had been cultivating said land, attorned to defendant and gave him notes for the rent. The defendant then offered in evidence a schedule in bankruptcy of property filed by the plaintiff. This schedule contains no mention of the land trespassed upon, and purports to be a schedule of all the real estate and interest in lands which the plaintiff had at the filing of his petition. Plaintiff objected to the introduction of such transcript of said sched-

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ule; the court overruled the objections, admitted the testimony, and the defendant excepted. Plaintiff was then recalled by the defendant, and testified that the schedule offered was a true copy of the one filed by him, and gave as a reason for not including the lands mentioned in the complaint, that he had previously sold the lands to his son, and that after he had sold it to his son, he had controlled and cultivated it by his son's permission, but that he had not agreed to pay him any rent for the same. It was shown that Mary Lankford, the defendant in the ejectment suit, had never been in possession of the land mentioned in the complaint in this suit. This was in substance all the evidence, and the plaintiff requested the following written charge: "When a person by himself and tenants is in possession of and cultivating lands, holding adversely to a plaintiff in a writ of restitution, the party in possession not being a party to the writ, in order to put the plaintiff in the writ of restitution in possession of the lands, the officer must notify the party holding adversely to plaintiff to attorn to or recognize the plaintiff as landlord, and upon the refusal of the party to attorn or recognize plaintiff as landlord, the officer must put the party holding adversely out of possession." This charge the court refused to give, and the plaintiff excepted.

There was a verdict and judgment for the defendant and the plaintiff brings the case to this court by appeal, assigning as error the various rulings to which exceptions were reserved.

DAVID CLOPTON, and M. J. TURNLEY, for appellant.—This was an action for an injury to possession of land, and whether founded on good or bad title, this possession will support the action against a mere wrong doer.—5 Stew. & Port. 182. The schedule, then, was immaterial; it could shed no light on the question of possession *vel non* at the time of the alleged trespass, and should have been excluded.—3 Ala. 679; 8 Por. 311; 17 Ala. 566. The admission of this evidence must work a reversal.—30 Ala. 672. The plaintiff was not a party to the ejectment suit, and it could not prejudice his possession, unless he was actually dispossessed under the writ, in this cause. The evidence shows only a sham delivery to Green, and he never was in possession until he committed the trespass complained of in this suit.

WATTS & SONS, *contra*.—There is no entry as to the disposal of the demurrer, and it cannot be noticed in the decision of the cause. The only way in which the refusal of the court to strike out a plea can be brought to the notice of this court is by a bill of exceptions, and the bill of exceptions

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shows no exception to the action of the court on this plea. The record of the ejectment suit was competent to show that the defendant had been put in possession of the identical lands mentioned in the complaint in this cause, before the commission of the alleged trespass. The schedule tended to show that the plaintiff did not own the land mentioned, and was competent evidence to lessen the weight of the plaintiff's testimony as to his possession.

BRICKELL, C. J.—The refusal to strike out a plea which is merely defective, not a nullity, is not revisable on error. The primary court may, in its discretion, refuse to entertain the motion, and put the party on his demurrer.—*Johnson v. Wren*, 3 Stew. 172; *Townson v. Moore*, 9 Port. 136; *Stanley v. Hill*, *ib.* 368; *Turner v. Brown*, 9 Ala. 867; *Johnson v. McLaughlin*, *ib.* 551; *Williams v. Hinkle*, 15 Ala. 713; *Duncan v. Hargrove*, 22 Ala. 150; *Mahoney v. O'Leary*, 34 Ala. 97. The rule is changed, when the court, in the exercise of its discretion, entertains the motion, and improperly strikes out the plea, if an exception is taken.—*Mahoney v. O'Leary*, *supra*. The plea of the bankruptcy of the plaintiff, may be demurrable but it is not a mere nullity. The cause of action would survive to the personal representatives of the plaintiff on his death, and would also survive the death of the defendant.—Code of 1876, §§ 2920, 2921. It would consequently pass to an assignee in bankruptcy, and if it existed when the plaintiff became bankrupt, could subsequently be pursued only by the assignee.

The demurrer to the plea does not appear from the record to have been acted on by the Circuit Court, and we do not inquire whether it was well taken or not.

The action is trespass *quare clausum fregit*, and to maintain it, the plaintiff is not bound to show title. Possession, whether founded on a good or bad title, will support the action against a stranger or wrong-doer. Or, the possession may be tortious, and a wrong-doer cannot justify or excuse an invasion of, and injury to it.—*Duncan v. Potts*, 5 Stew. & Port. 182; 2 Green. Ev. § 618. The title may be, and often is, drawn in question; the *gist* of the action is nevertheless the injury to the plaintiff's possession. When the trespass was committed the evidence is undisputed the plaintiff was in actual possession, and the trespass was subsequent to the plaintiff's discharge in bankruptcy. The plea of bankruptcy was therefore on the evidence merely frivolous. Nor were the schedules in bankruptcy appended to his petition relevant evidence. If title to the premises had been involved, and it had been necessary for the plaintiff to show title in

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himself at the time of the bankruptcy, these schedules would have been admissible. If the premises were embraced in them, the title by operation of law would have been divested; or, the failure to embrace them, would have been a fact for the consideration of the jury in determining the existence of the title. The action is founded, not on title, but on an actual possession existing subsequent to the discharge in bankruptcy, and the schedules were irrelevant.

The defendant, as a fact tending to show his possession of the premises, and an unlawful entry on them by the plaintiff, offered in evidence the record of an action in the nature of ejectment he had instituted against one Mary Lankford, the judgment therein, which was by default, and the writ of possession issuing thereon. The only execution of the writ as shown by the evidence, was that the sheriff and the defendant rode on the premises, and the sheriff said to the defendant, "Here is your land; I put you in possession under the writ." Though no one was then residing on the land, there were, as it seems, several persons cultivating it, one of whom in a few days attorned to the defendant. The defendant offered no evidence of title in himself, and none that Mary Lankford was in possession at or prior to the commencement of the suit against her, nor, indeed, that she ever had possession. The evidence of the plaintiff was, that for many years, except a short time during the war, he was in actual possession of the premises, and was in possession when the action against Mary Lankford was commenced. We think it plain the Circuit Court erred in overruling the objections to this evidence. A judgment in ejectment, or in the statutory action in the nature of ejectment, binds only parties and privies. It is not evidence against strangers; and a party in possession at the time of its commencement who is not made a defendant, is a stranger to it, and cannot be affected by it.—*Smith v. Gayle*, MSS. It is also equally plain there was not an execution of the writ of possession. There was no dispossession of any tenant who was cultivating the premises, nor any notice given the tenant to yield possession to the defendant. In the execution of a writ of possession, it is the duty of the sheriff to place the plaintiff in the actual and peaceable possession of the premises recovered. If the tenant in possession does not yield peaceably and quietly, he must be removed, and until he is removed, the writ is not executed.—2 Tidd's Pr. 1246-7; Freeman on Executions, § 474; *Farnsworth v. Fowler*, 1 Swan, 1. The defendant did not obtain possession by quietly riding on the premises with the sheriff, and the idle declaration, "Here is your land; I put you in possession under the writ," of which

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those who were in actual possession had no notice or information. Possession of lands is not legally transferred by such ceremonies.

The judgment is reversed and the cause remanded.

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Indictment for using Vulgar and Abusive Language in presence of Females.

1. *Highway*; what is not, within meaning of § 4203 of Code of 1876.—The track of a railroad company, used to carry on its business as a common carrier, is not a public highway, within the meaning of the statute against the use of vulgar and abusive language. To constitute such highway, there must be a road dedicated to, and kept up by the public, as distinguished from a private way.

APPEAL from Russell Circuit Court.

Tried before Hon. W. B. WOOD.

The opinion states the case.

G. D. HOOPER, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—The indictment is founded on the statute (Code of 1876, § 4203), which reads: "If any person enters into the dwelling-house of another, or upon the curtilage thereof, or upon the public highway near such premises, and in the presence of the family of the owner thereof, or of any member of his family, or of any female, and makes use of abusive, insulting, or vulgar language, he shall be deemed guilty of a misdemeanor," &c. The evidence showed that the accused made use of profane, abusive and insulting language while walking along the Mobile & Girard Railroad, within two or three hundred yards of the dwelling-house of Henry Freeman, in the presence of his son and daughter, and within the hearing of his family. The court, on this evidence, instructed the jury that the Mobile & Girard Railroad was a public highway, within the meaning of the statute; and to this instruction an exception was reserved.

The Mobile & Girard Railroad was probably constructed by a private corporation, under a charter from the general

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assembly of this State, but if that be true, the courts can not know it judicially.—*Ala. & Tenn. R. R. Co.*, 29 Ala. 221; *City Council v. M. & M. Plank Road Co.*, 31 Ala. 76. And if such is the fact, the road would not be a *public highway*.—*S. & N. R. R. Co. v. Pillgreen*, in MSS. “Every thoroughfare which is used by the public, and which is, in the language of the English books, ‘common to all the king’s subjects,’ is a highway, whether it be a carriage-way, a horse-way, a foot-way, or a navigable river.”—3 Kent, 548. The statute against gaming forbids it at *any public house or highway*, and it has been several times decided that the term *highway* is intended to designate “a public road—that is, a road dedicated to and kept up by the public, as contradistinguished from private ways or neighborhood roads, which are not so kept up.”—*Mills v. State*, 20 Ala. 86; *Glass v. State*, 30 Ala. 529; *Napier v. State*, 50 Ala. 169. A navigable river, though declared by law—State and Federal—a public highway for certain purposes, is not a public highway within the meaning of the statute against gaming.—*Glass v. State*, *supra*; nor is a railroad, “the property of a private corporation, kept up and operated by it, though open to the public for travel and the transportation of freight.”—*Napier v. State*, *supra*. When particular words and phrases found in existing statutes have, by judicial decision, acquired a precise meaning, and are employed in subsequent statutes, the intent to to use them in a different and larger sense ought to be clear and unequivocal, before there is a departure from this ascertained meaning.

The instruction is erroneous. There was no fact shown which fixes the character of the Mobile & Girard Railroad as a *public highway*; and the only facts which would fix upon it that character, are that it is a *public road*, as defined in the decisions to which we have referred.

The judgment is reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

[Rowland et als. v. Jones et al.]

Rowland et als. v. Jones et al.*Bill in Equity for Injunction.*

1. *Decree; what can not be supported.*—A decree in equity, materially affecting the right and interests of infant defendants, can not be supported, when assailed on error, unless the record affirmatively shows that they were brought before the court in the mode prescribed by the rules of practice, and that a guardian *ad litem* had been regularly appointed to represent and defend them.

2. *Same; what will not uphold.*—The appearance and answer by a guardian *ad litem*, recognized by the court, if the guardian *ad litem* comes in without appointment, or under an irregular appointment, or under an appointment prematurely made, because service had not been perfected on the infant defendants, can not uphold the decree.

APPEAL from Chambers Chancery Court.

Heard before Hon. N. S. GRAHAM.

The facts are stated in the opinion.

W. H. BARNES, for appellant.

J. J. ROBINSON, *contra*.

BRICKELL, C. J.—A decree in equity against infant defendants, necessary parties, having rights and interests materially affected by the decree, can not be supported when assailed on error, unless the record affirmatively shows that they have been brought before the court in the mode prescribed by the rules of practice, and the regular appointment of a guardian *ad litem* to represent and defend for them. These may, as in the present case, be an appearance for them, and an answer by a guardian *ad litem* recognized by the court. But if he comes in without the appointment of the court, or under an irregular appointment, or an appointment premature, because the court has not, in the mode prescribed by law, by service of process if the infant is a resident of the State, or, if a non-resident, by publication, acquired jurisdiction of the person, the decree can not be sustained.

The bill avers that Howell F. and Lucy C. Erwin, material defendants, heirs-at-law, and next of kin of Hezekiah F. Erwin, deceased, were infants over the age of fourteen years, and residents of the State of Georgia. An order of publication as to them was made by the register, on proper evidence of their infancy and non-residence. But if this

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order was regularly perfected, it is not shown by the record. Without evidence that it had been perfected, the register proceeded to the appointment of a guardian *ad litem*, who accepted the appointment and appeared and answered. The appointment was irregular and premature, and compels a reversal of the decree.—1 Brick. Dig. 761, §§ 1819-20; 762, §§ 1823, 1828, 1829.

As this will render it necessary to retake the testimony in the cause, and as we can not know what testimony may hereafter be introduced, it would be a departure from the practice of the court to express an opinion upon the merits of the case.

Reversed and remanded.

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Action on Official Bond of Clerk.

1. *Judgment; assignment of; what sufficient.*—The assignment of a judgment may be by writing or parol, and when made in either manner and founded on a sufficient consideration, passes the same right and confers the same authority; and no entry of it on the records of the court is required.

2. *Execution; what sufficient application for issue of.*—An oral or verbal application to the clerk of the court in which a judgment has been rendered, to issue an *alias* or *pluries* execution for its satisfaction, is sufficient, if he does not then require a written demand.

3. *Same; what not sufficient excuse for failure to issue.*—Where such application is made by one claiming to be the assignee of the judgment, his agent or attorney, the clerk, if he deem it necessary for his own protection, may require evidence of the assignment or of the authority of the person making the demand; failing to do so then, he cannot afterwards set up the failure to offer such proof, to relieve himself and sureties upon his official bond from liability for damages, which the assignee sustained from the failure to comply with the demand.

4. *Errors; what not noticed.*—Errors assigned, but not insisted on in brief or argument, will not be noticed.

APPEAL from Greene Circuit Court.

Tried before Hon. LUTHER R. SMITH.

The appellee, Elijah S. Thompson, as the administrator of Duncan Hunnicutt, deceased, brought this action against the appellants, John D. Steele, and others, who were the sureties on the official bond of James A. Steele, as Clerk of the Circuit Court of Greene county, to recover the damages caused by the failure of said James A. Steele to issue an alias execution against one Kirksey and others, after request, &c. The facts may be thus stated:

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On the 9th day of April, 1874, Simeon M. Brown received a judgment against Foster M. Kirksey, Lewis F. Pollard and Julius Cleaveland for \$1,836.32. An execution issued on this judgment on the 27th day of the same month, and was levied on the lands of Kirksey, and the sheriff was proceeding under the execution to sell the same.

At the fall term, 1873, Kirksey & Carpenter, of which Foster M. Kirksey was a member, recovered a judgment against Stephen C. Brown for about \$1,300.00. Prior to the 27th day of July, 1874, Foster M. Kirksey being indebted to appellee, in his representative capacity, transferred to him as collateral the judgment against Stephen C. Brown. The sheriff was proceeding to make the money under each of these executions. While matters stood thus it was agreed between the appellee, Kirksey, Simeon M., and Stephen C. Brown, that appellee should give up the Stephen C. Brown judgment, and Kirksey should satisfy the judgment of record; that Kirksey should pay in cash to Simeon M. Brown the difference between the two judgments, and Stephen C. Brown should pay or secure to Simeon M. Brown the balance due Simeon M. on his judgment against Kirksey, and Simeon M. was to transfer his judgment to appellee. This arrangement was carried out. Kirksey satisfied the Stephen C. Brown judgment and paid Simeon M. in cash the difference between the two judgments. Stephen C. secured, and afterwards paid to Simeon M. the amount due to him, and Simeon M. transferred to the appellee his judgment against Kirksey without recourse. Kirksey and Simeon M. Brown then went to James A. Steele's (the sheriff) office and informed him that the matter "was arranged," as before stated, and stopped the sale of Kirksey's land, and the sheriff thereupon endorsed the execution, "27th July, 1874; settled."

Subsequently, James A. Steele became Clerk of the Circuit Court, giving bond with the appellants as his sureties, and on or about the 13th day of March, 1875, E. Morgan, Esq., an attorney at law, represented to Steele, as clerk, that the appellee was the owner of said judgment of Simeon M. Brown against Kirksey, Pollard & Cleaveland, and that he, Morgan, was attorney of the appellee, and directed Steele to issue an alias execution on the judgment. Steele had no other information of the transfer to appellee or of Morgan's authority as attorney to control the judgment, than the representations of said Morgan. There was nothing of record pertaining to the transfer, and Morgan nowhere appeared of record as an attorney authorized to control it, but on the contrary, was one of the attorneys of the defendants in the cause of Simeon M. Brown against Kirksey and others.

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The clerk declined to issue the execution and has subsequently died. The evidence shows that Kirksey owned sufficient property out of which to have satisfied the judgment at the time when the order was made to issue the *alias*, and that he subsequently became insolvent.

Defendants excepted to the refusal of following written charges: "1. If Simeon M. Brown, the plaintiff in the judgment, told the sheriff that the judgment was settled and the sheriff at the time so endorsed the judgment "settled," then the clerk had no authority to issue another execution without an order of court. 2. It matters not as to the form of the transaction, if it was agreed by the parties to the transaction that the judgment against Stephen C. Brown, in favor of Kirksey and Carpenter, and which Thompson held as collateral, should be given up and satisfied by Kirksey, and no money was paid him, and that Kirksey was to pay, and did pay, Simeon M. Brown about five hundred dollars on his judgment against Kirksey, Pollard and Cleaveland, and Stephen C. Brown, in consequence of the judgment against him being satisfied by Kirksey, should pay, and did pay, Simeon M. Brown the balance of his judgment, then Simeon M. Brown's judgment against Kirksey, Cleaveland and Pollard was paid and the assignment of said judgment by Simeon M. Brown to Thompson, after the payment, was a nullity. 3. If the jury believe from the evidence that Enoch Morgan, Esq., *was not the attorney of record* for the plaintiff in the case of Simeon M. Brown against Foster M. Kirksey, Lewis F. Pollard and Julius Cleaveland, and that James A. Steele, while sheriff and having the execution in his hands, was notified or instructed by Simeon M. Brown, the plaintiff, in July, 1874, that said execution had been settled and not to sell the lands of Kirksey, which Steele had levied upon under said execution, then, even though said Enoch Morgan, Esq., verbally ordered said James A. Steele, while he was the clerk of said Circuit Court, to issue said execution, unless the evidence shows that the plaintiff, Simeon M. Brown, or his attorneys of record, notified said clerk of the transfer of said execution to Thompson, and instructed him to issue the same, the same James A. Steele as such clerk was not bound to obey said Morgan and issue said execution. 4. If the jury believe from the evidence that Thompson held the Stephen C. Brown judgment as collateral from Kirksey, then he held it for the benefit of Kirksey, to be applied when collected, to Kirksey's debt, due Thompson, and if by the transaction he, Thompson, suffered it to go in payment of the Simeon M. Brown judgment, then it operated as a payment to that extent of the Simeon M. Brown judgment.

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There were other exceptions taken and errors assigned on them, which, in the view the court takes of this case, need not be further noticed. There was a verdict and judgment for the plaintiff for the amount due on the judgment and interest, and the defendants bring the case here by appeal.

SNEDECOR, COCKRELL & HEAD, for appellants.—The clerk of a court of record cannot be required in the discharge of his official duties to look to any other source of information to guide him, than that offered by the records of his office. The rules of the court prescribe how an attorney shall enter his appearance, and Morgan failed to observe these requirements. There was nothing to show that Morgan was the attorney of a party authorized to control the judgment, and Steele properly refused to issue the execution on his demand.—See *Nabors v. Nabors*, 2 Port. 162. The order given by Morgan was not entered in the order book kept according to the strict rule of Circuit Court practice.—See 11 Miss. 273; 28 Ala. 711; 6 Port. 438.

The Simeon M. Brown judgment against Kirksey, Pollard and Cleaveland had been paid. It must be borne in mind that Thompson held the Stephen C. Brown judgment only as a collateral, that he never applied it to the payment *pro tanto* of Kirksey's indebtedness to him. In this state of facts he allows Kirksey to use that judgment in payment of the judgment in favor of Simeon M. That judgment was consequently the property of Kirksey, when he used it in satisfying the Simeon M. Brown judgment, and being his property it of course satisfied that judgment, and its attempted transfer is a nullity.

W. P. WEBB, and ENOCH MORGAN, *contra*.—The transaction between appellee, the two Browns and Kirksey, was simply a transfer of securities. The parties did not intend that it should operate as payment, and to hold, on technical ground, that there was a payment of it, would work rank injustice to Thompson. The assignment carried with it the right to control the execution independent of plaintiff.—See 2 Brick. Dig. 153, § 312, and cases cited. The attorney of the assignee was an officer of court, and the clerk was bound to obey his orders. If the clerk doubted the authority of the attorney, he could have demanded it, and if not produced or proved, he might then refuse to issue the execution at his peril.—Code, § 671. There is no rule of law requiring the transfer to be entered of record, and there is also no rule which requires a request to the clerk to be in writing. It is sufficient to sustain this action that there was a request to

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issue by a person authorized to make it, and a refusal to issue without just excuse.

BRICKELL, C. J.—The errors assigned, are numerous, but we do not feel bound to express an opinion in reference to any other than such as are insisted upon in the argument of counsel.—*Weathers v. Spears*, 32 Ala. 584; *Cunningham v. Carpenter*, 10 Ala. 109.

The first question is, whether it is the duty of the clerk of a court in which a judgment has been rendered to issue execution thereon, at the verbal request of an attorney of the assignee of the judgment, the assignment not appearing of record in the court, and no written evidence of it being shown him, nor the attorney having entered himself of record, as an attorney for the plaintiff in the judgment. Judgments, as well as choses in action, are assignable. The assignment may not clothe the assignee with the legal title, but if it is unqualified, it passes the entire equitable interest, and is an irrevocable authority to employ the name of the assignor in enforcing it, and collecting and receiving the money due thereon. The court in which the judgment was rendered will protect the rights of the assignee, and will prevent the assignor from interfering with his contract over it. No payment made to the assignor after notice of the assignment is valid, and by no release or admission can he impair the equity of the assignee.—*Holland v. Dale*, Minor, 265; *Gayle v. Benson*, 3 Ala. 234; 2 Brick. Dig. 153, § 312; *Freeman on Executions*, § 21. The assignment may be by writing, or by parol, and either, when founded on a sufficient consideration, passes the same rights, and confers the same authority. No entry of it on the records of the court is essential to its validity and operation, nor is there any statute, or rule of the common law, requiring that such entry shall be made.

An execution in civil actions, is the process by which the debt, or damages, or other thing recorded, and the costs adjudged, is obtained. The clerk of the court is charged with the duty of issuing the original, within a certain number of days after the adjournment of the court. If satisfaction is not obtained by the original, the party interested has the right to an *alias*, and a *pluries*, until satisfaction is obtained. These writs it is the duty of the clerk to issue on application; and his failure is a breach of his official bond, which binds him to the performance of all the duties required of him by law. The application may be oral or written. If the clerk deems it necessary for his protection, he may require that it be reduced to writing. But if it is oral, and

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he makes no objection on that ground when it is made, he cannot subsequently excuse his failure to comply with it, on the ground that it was not in writing. If he had objected, the cause of objection would have been easily removed; but not then objecting, and tacitly accepting the application as sufficient, it would be gross injustice to suffer him to excuse his failure from which injury has resulted, because of the manner of the application. So, if the application is made by a party having the real interest in the judgment, entitled to control it, though his interest and authority may not appear of record, he may demand some evidence of the interest or authority, if he doubts it. But if he makes no such demand—if by his silence he recognizes the interest and authority, it would approach a fraud, if he was heard subsequently to say in excuse for his failure to issue the writ, when injury had resulted, that no evidence of the interest or authority was shown him. As assignee of the judgment against Kirksey, the appellee had full authority over it. It was his right to demand execution thereon in the name of the plaintiff, and it was the duty of the clerk to comply with the demand when it was made. There is no particular form required, in which the demand should be communicated to the clerk, and if there had been, the form could have been waived by the clerk, and it was waived when he did not object to the form in which it was made. The assignee may control the judgment through an attorney, or an agent, and the demand or instructions of the attorney or agent, are of the same force as if they had proceeded from him personally.

It is enough to say in reference to the remaining question, there was no evidence the judgment was satisfied before the demand of the issue of execution. On the contrary, the evidence seems to us, undisputable, that it was unpaid, and the just inference is, the clerk knew the fact.

Let the judgment be affirmed.

[Anderson et al. v. Wynne et als.]

Anderson et al. v. Wynne et als.

Bill in Equity to settle Guardianship.

1. *Guardian; for what not chargeable.*—In this case, the court reaffirms, and declines to depart from the rule declared in numerous decisions, that an executor, or administrator, or guardian (not a mere agent or attorney), who, in good faith and in the exercise of reasonable diligence, during the war, in the regular administration of the trust, received, in satisfaction of debts due him in his representative capacity, Confederate treasury notes, while they were the circulating medium and generally received in payment of debts and in the transaction of business, is not chargeable, because the results of the war rendered them worthless.

APPEAL from Greene Chancery Court.

Heard before Hon. A. W. DILLARD.

This was a bill filed by the appellees, Erasmus Wynne and others, who are his brothers and sisters, against the appellant, Thomas J. Anderson, their former guardian, and Sarah E. Kimbrough, as the administratrix of a deceased surety on his bond. The facts may be thus stated: Anderson was appointed guardian of appellees in 1863, and gave bond, with the intestate of his co-appellant, Sarah E. Kimbrough, as his surety. Soon after, he received, as such guardian, in Confederate currency, about three hundred dollars, coming to appellees on a distribution of the proceeds of sale of lands belonging to their grand-father's estate. This is shown to be the only property of his wards that ever came into his hands; and, in his answer, he avers that he had never used any of said money for his own benefit, and offers to return the identical money he received. The proof sustains his answer. The chancellor held that he was liable to account, in good money, for the sum thus received, and ordered an account to be stated. From this decree Anderson and the administratrix of his surety appeal.

E. MORGAN, and W. & J. WEBB, for appellants.—The proof shows that Anderson only received Confederate money, and that the same perished on his hands, by the results of the war, and without fault on his part. There are numerous decisions of this court which hold that he is not chargeable for such a loss.—See *Key v. Jones*, 52 Ala. 238; *Waring v. Lewis*, 53 Ala. 615.

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SNEDECOR & COCKRELL, *contra*.—The liability of the guardian is supported by the following authorities: *Horn v. Lockard*, 17 Wallace, 570; *Houston v. DeLoach*, 43 Ala. 364; *Powell & Boon v. Booth*, 43 Ala. 459; *Hudgins v. Cameron*, Adm'r, 50 Ala. 379; *Millsap v. Stanley*, 50 Ala. 319.

BRICKELL, C. J.—There are numerous decisions of this court, from which we have no inclination to depart, that an executor, or administrator, or guardian, or trustee (not a mere agent or attorney), who, in good faith and in the exercise of reasonable diligence, during the war, in the regular administration of the trust, received, in satisfaction of debts due to him in his representative capacity, Confederate treasury notes, while they were the circulating medium, and generally received in payment of debts and in the transaction of business, is not chargeable, because the results of the war rendered them valueless.—*Ferguson v. Lowry*, 54 Ala. 510; *Waring v. Lewis*, 53 Ala. 615; *Key v. Jones*, 52 Ala. 238; *Foscoe v. Lyon*, 55 Ala. 441. The discussion of the question cannot be reopened. The decree of the Chancellor is in direct conflict with this doctrine, with the decisions to which reference is made, and other decisions of this court in manuscript. The result is, the decree must be reversed, and a decree here rendered dismissing the bill at the costs of the appellees in this court, and in the court of chancery.

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Bill in Equity to settle Administration.

1. *Lapse of time; how may be set up.*—It is settled in this State, that in courts of equity lapse of time rendering a demand stale, or the statute of limitations, the bill disclosing that the claim or demand is obnoxious to either, may be taken advantage of by answer or demurrer, as well as by plea.

2. *Executor or administrator; what lapse of time necessary to constitute bar in favor of, against distributee.*—Under the decisions of this State the lapse of twenty years, during which time there is no acknowledgment by the personal representative of the existence of the trust, will constitute a bar to any proceedings by a legatee or distributee for a settlement of the estate; but this time is to be computed not from the grant of letters, but from the period at which the personal representative could have been coerced to settlement.

3. *Statute of limitation; to whom do not apply.*—Suits against a personal representative to compel a settlement of his trust, are not within the terms or spirit of the statute of limitations, and there is no statutory bar to such proceedings; and the fact that his sureties on his bond are protected by a statutory limitation, cannot avail the personal representative, who is liable to those beneficially interested, independently of his bond.

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APPEAL from Sumter Chancery Court.

Heard before Hon. A. W. DILLARD.

This was a bill filed on the 26th of December, 1878, by the appellees, John Greenlees and his sister, against the appellant, Hugh Greenlees, as the administrator of their deceased mother, Isabella Greenlees, who had died in Sumter county in 1859, and upon whose estate the appellant was appointed administrator on the 11th day of January, 1859. The bill alleged that the appellant had sold large quantities of land belonging to said estate and had received the purchase money, and that no settlement of said administration had ever been made, and prayed an account and settlement in the Chancery Court. The appellant assigned three grounds of demurer: 1. That the demand sought to be enforced was stale. 2. That the demand sought to be asserted is barred by the statute of limitations of ten years. 3. That the demand sought to be enforced was barred by the statute of six years. These demurrers the chancellor overruled, and the defendant brings the case here by appeal.

SNEDECOR & COCKRELL, for appellant.

THOMAS B. WETMORE, *contra*.

BRICKELL, C. J.—It is a settled practice in courts of equity in this State, that lapse of time, rendering a demand stale, or the statute of limitations, the bill disclosing that the claim or demand is obnoxious to either, is available not by plea only, but by demurrer or answer.—1 Brick. Dig. 699, § 859.

The present bill is filed by the next of kin against an administrator, to compel him to an account of his administration, and to distribution. Twenty years from the grant of administration, less fourteen days, had elapsed before the filing of the bill, and no reason for the long delay, no disability of any of the parties complaining, is averred. The demurrer interposes three distinct grounds: *First*, that the demand is stale; *second*, that it is barred by statute of limitations of six years; *third*, that it is barred by the statute of limitations of ten years.

An administrator or an executor stands to creditors next of kin, and legatees in relation of a trustee of an express trust, and the statute of limitations has no application, and is not available to him, unless he could show an open disclaimer of the trust, of which the *cestui que trust* had notice, continuing for the length of time prescribed as a bar. The sureties on this bond, not standing in the relation of trustees,

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bound only by contract, are protected by the terms of the statute.—Code of 1876, § 3226; *Fretwell v. McLemore*, 52 Ala. 124. Prior to the Code, actions of debt or covenant founded on any *single or penal bill for the payment* of money only, were barred after sixteen years.—Clay's Dig. 327, § 81. It was often decided, that suits in equity, or proceedings in the court of probate, against an executor or administrator, were not within the words or spirit of this statute, and that there was no statutory bar to such suits or proceedings. The only changes in the statute made by the Code are, prescribing six years as a bar to suits against the sureties, "the time to be computed from the act done, or omitted by their principal, which fixes the liability of the surety," and limiting actions "founded upon any contract, or writing under seal," to ten years. Code of 1876, § 3225. In addition, the limitations to actions at law, are applied to suits in chancery.—Code of 1876, § 3758.

The second ground of demurrer has consequently no foundation. The principal cannot invoke a statute intended for the benefit of, and by its terms expressly limited to his sureties. Nor can he invoke the statute of ten years. The suit is not founded on the bond, which is but a security for his faithful discharge of the trust confided to him. It is founded on the trust, and is without the operation of the statute of limitations. The trust would exist, and he would be compelled to its faithful discharge and execution, though no bond had been given. A grant of administration, though accompanied with an express direction that the administrator shall give bond, is not void, but only voidable, if he neglects or fails to give it. *Ex parte Maxwell*, 37 Ala. 262. The statute of ten years was not intended for the protection of an executor or administrator called to an account of his administration by the *cestui que trust*. The principle yet remains, undisturbed by statute, that an express trust, peculiarly and exclusively the subject of equitable jurisdiction, is not within the operation of the statutes of limitation.—1 Brick. Dig. 699, § 856. The trust may by legislation now fall within the jurisdiction of the court of probate; it is not the less an equity, its character is not changed, and over it, courts of equity retain their original jurisdiction unimpaired.

A demand for the enforcement of an express trust, may, however, grow stale, and courts of equity acting on "their own inherent doctrine of discouraging for the peace of society, antiquated demands," may refuse to interfere. "It is often suggested," says Judge Story, "that lapse of time constitutes no bar in cases of trusts. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowl-

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edged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. But where the relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions, unfavorable to its continuance; in all such cases, a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice."—2 Story's Equ. § 1520.

It has long been the settled doctrine of this court, from which there has been, and can be no departure, that if the parties interested in the administration of an estate, suffer twenty years to elapse from the time, the executor or administrator could be called to account, and there is no recognition of the trust as continuing and undischarged, the lapse of time is a positive bar to a suit in equity, or to proceedings in the court of probate. No disability of the parties, no inability of suit, will prevent the bar from attaching. It can be avoided only by an admission or recognition of the trust as continuing unsettled.—*Harrison v. Heftin*, 54 Ala. 552. The time is computed, not from the grant of administration, but from eighteen months thereafter, when proceedings for a settlement of the administration can be properly instituted. A less period than twenty years has not been deemed as operating a bar, and if there be any special circumstances which would render a demand for a settlement of an administration stale, according to the doctrines of a court of equity within less than twenty years, they are not disclosed by the present bill.—*Johnson v. Johnson*, 5 Ala. 90. Twenty years from the period, when the administrator could have been called to a settlement, not having elapsed before the filing of the present bill, it was not subject to the demurrer interposed, and the decree of the chancellor overruling it must be affirmed.

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Buckalew v. The State.

Indictment for setting up or carrying on Lottery.

1. *Lottery; what constitutes.*—Lottery in its popular acceptation, is a distribution of prizes by lot or chance; and wherever chances are sold and the distribution of prizes determined by lot, this, it would seem, constitutes a lottery.

2. *Same; what does not constitute.*—Where money is put upon a round board in equal amounts, by several persons, each in turn whirling a hand fastened in the centre, the one at whose whirl the hand registers the highest number on the rim of the board, taking all the money on the board, the owner of the board sometimes putting up money and sometimes charging a small sum, to be paid by the winner, for the use of the board; this does not constitute a lottery, or render the keeper or owner of the board liable to indictment for keeping or setting up a lottery; but whether upon these facts the owner of the table is not indictable for keeping or exhibiting a table for gaming within the meaning of section 4208 of the Code, is not decided.

3. *Indictment; finding of; what does not prevent statute of limitations from running.*—An indictment for keeping or exhibiting a table for gaming, is not a continuation of a prosecution for setting up a lottery; and hence the finding of an indictment for the latter offense, can not prevent the bar of the statute from running against an indictment for the former.

APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellant, L. L. Buckalew, was indicted for “setting up or being concerned in setting up or carrying on a lottery.”

The State introduced a witness, who testified that within twelve months before the finding of the indictment, in this cause, and in Chambers county, Alabama, “the defendant had a mill, and in the mill house, on the head of a flour barrel, he had what the witness called a board, on which was marked, in a circle, figures from one to forty-eight, with a heart in the centre, fastened on a pivot with a point or hand pointing to the numbers, and which could be made to rotate or turn; that parties were in the habit of putting down money, each putting down the same amount, and then each would whirl the heart, and the one on whose whirl the finger or hand on the heart stopped pointing to the highest number, won all the money; that the defendant sometimes put down money as one of the players, and that for the last few days that the same was played on, the defendant charged a nickle for the use of the board, to be paid by the one winning.”

This was in substance all the evidence in the case.

The court, of its own motion, charged the jury, among

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other things, "that if the evidence satisfied them beyond all reasonable doubt, that the defendant owned a table on which, in a circle, were the numbers from one to forty-eight, and had a point or heart in the centre, with a point pointing towards the numbers on the outside, and parties assembled and put down their money, each putting down the same amount, and then each whirling the point, and the one at whose whirl the heart pointed to the highest number on the circle, won or took all the money, and the winner paid the defendant as the owner of said board or table one nickle for each game, and this was done in Chambers county, in this State, and within twelve months before the finding of the indictment, and this was done under the control of the defendant, then the defendant would be guilty as charged in the indictment, and they should so find him." To this charge the defendant excepted.

The defendant then requested the following written charges: "1. If the jury believe all the evidence in this case, that they must find the defendant not guilty. 2. That to constitute a lottery there must be a sale of prizes by the manager and a redemption of the successful one by the party selling the prizes. 3. That if the defendant had in his house a table in which other persons put down their money, any amount they saw fit, and then themselves rolled or turned a wheel, and the highest number took all the money, and the defendant only got one nickle for the use of the table, they, the jury, cannot find him guilty, and if they have any reasonable doubt on this subject, they should find him not guilty." The court refused each of these charges separately, and defendant separately excepted.

W. H. BARNES, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—Lottery is a distribution of prizes by lot or chance.—Webster's Dictionary; Bouvier's Law Dictionary. There are said to be two kinds of lottery in general use. One, the Genoise, or numerical system; sometimes called the combination plan. The other, the Dutch, or class lottery; sometimes called the single number plan.—American Cyclopædia. In each, chances are purchased, generally by the purchase of tickets, or fractions of a ticket. Not necessary, however, that tickets should be issued. Wherever chances are sold, and the distribution of prizes determined by lot, this, it would seem, is a lottery. This, we think, is the popular acceptance of the term. We judicially know

[Shepherd v. Story.]

what constitutes a lottery.—*Solomon v. The State*, 28 Ala. 83. According to the testimony in the present record, it cannot, with any propriety, be said that chances were sold, or prizes won or drawn. In fact, nothing was sold. The entire theory of the game was, that several, or many persons contributed equal sums to a common purse, which was awarded to the contributor whom chance so favored, as to register for him the highest number. In its result, it resembles what is known in horse-race parlance as sweepstakes; or, a raffle, determined by the fall of dice. We do not think the proof established a case of lottery, or sustained the indictment. Code of 1876, § 4445. Whether the defendant violated section 4208, Code of 1876, it would not be proper now to inquire.

We cannot perceive that the present case falls within any of the sections of our liberal system of amendments.—Code of 1876, sections 4815, 4816, 4817, 4818, 4819. It falls more nearly within the last-named of the sections; but the indictment did not charge that the defendant kept or exhibited, or was interested or concerned in keeping or exhibiting a table for gaming, within section 4208; and there is nothing which allows us to infer that was the offense intended to be charged in the present indictment. The record shows an intention to indict for another offense. An indictment for exhibiting a gaming table would not be a continuation of a prosecution for exhibiting a lottery, and hence a new indictment for the former offense could derive no support from the mistaken prosecution for the latter offense. The indictment in the present record was found at the spring term, 1878, and thus proves the act complained of was done more than twelve months ago.—Code of 1876, § 4646. The offense is barred, and no good can come of remanding the cause.

Reversed, but not remanded. Let the defendant be discharged.

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Detinue:

1. *Detinue; what judgment works no injury to plaintiff in.*—A plaintiff failing in a detinue suit, cannot complain that the jury failed to assess the alternate value of the property, and damages for its detention. Such judgment may work injury to the defendant, but can work no injury to the plaintiff.

[Scott v. Hodges.]

APPEAL from Pickens Circuit Court.

Tried before Hon. LUTHER R. SMITH.

This was an action of detinue, commenced by the appellant, John Shepherd, against the appellee, S. M. Story, for the recovery of certain personal property. The defendant failing to give bond, the appellant executed the statutory bond, and obtained possession of the property seized. On the trial, the jury rendered a verdict for the defendant, but there being no proof of the value of the property sued for, there was a failure to assess the alternate value of the property or damages for its detention. Thereupon the court rendered a judgment in favor of the defendant for the property sued for, with costs. This appeal is prosecuted from that judgment.

LEWIS M. STONE, and D. C. HODO, for appellant.

BRICKELL, C. J.—We cannot perceive that the failure of the jury to assess the value of the property and damages for its detention, can work any injury to the appellant. It may be of injury to the appellee, and may embarrass, if it does not bar his right to recover damages for the detention of the property during the time it was in the possession of the appellant, but to the latter it can work no injury.

Affirmed.

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Trover.

1. *Trover; when maintainable.*—C, who had a mule, executed to H, a written instrument acknowledging the receipt from H of a given sum of money in full payment for the mule, and providing that if C paid said sum of money and costs, to H by a given date, then the mule was to belong to C, otherwise the instrument was to remain in full force and effect. H permitted C to remain in possession. *Held:*

1. The effect of the instrument was to pass title to H, subject to be divested on payment of the specified sum, and until then, H was entitled to possession.

2. Whatever might be the right of a *bona fide* purchaser, one who occupied the relation to C of a voluntary donee, could acquire no greater right than he had, and could not set up want of notice; and the claim of title by such voluntary donee, and his assumption and use of the mule, were illegal and a conversion, for which trover lies.

2. *Demand; when not necessary.*—Where possession originated tortiously, and was adverse to the true owner, demand is not necessary to maintain trover.

.[Scott v. Hodges.]

APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES C. COBB.

This was an action of trover, brought by the appellee, C. C. Hodges, against the appellant, John R. Scott, for the conversion of a mule. On the trial the plaintiff introduced in evidence an instrument in writing, executed by M. J. and W. J. Cottle, on the 26th day of March, 1875, which acknowledged the receipt from plaintiff of a given sum of money, in full payment for the mule, and providing that if Cottle paid said sum of money and costs to plaintiff by the first day of October, 1875, then the mule was to belong to Cottle, otherwise the instrument was to remain in full force and effect. This instrument was duly recorded in the Probate Judge's office of Randolph county, on the 4th day of June, 1875. The value of the mule was proved, and that the Cottles were in possession at the date of execution of the mortgage. Plaintiff also testified that about the middle of August, 1875, he was at the residence of said Cottle, and found him and one Clarke, an agent of defendant, bringing said mule from the pasture of said Cottle, and that he notified said Clark that he had the mortgage, and that a few days thereafter he saw said mule in possession of the defendant and demanded possession, which was refused.

Defendant then proved a bill of sale to said mule, made by Cottle on the 18th day of May, 1875, but there was no proof that he paid any consideration for the same.

There was evidence tending to prove that defendant received possession of the mule about the middle of August, 1875, and before he had notice of the mortgage to plaintiff, and has held possession of him ever since.

The court, in its general charge, charged the jury that the plaintiff had the right to the possession of the mule, as against the defendant, at any time after the execution of the instrument offered in evidence by the plaintiff. To this charge the defendant excepted. The defendant then asked the following written charges: "1. That to support the action of trover, the plaintiff must, at the time of the conversion, have had a property in the mule, either general or special, and the actual possession, or the right to immediate possession, and that the instrument offered in evidence did not give to him the right to the possession of the mule until the first day of October, 1875. 2. That all conversions may be divided into four distinct classes—1, by a wrongful taking; 2, by an illegal assumption of ownership; 3, by an illegal user or misuser; 4, by a wrongful detention. In the first three named classes there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant

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is sufficient to prove the conversion. In the latter case alone is such evidence to be required, as the mere detention of a chattel furnishes no evidence of a disposition to convert it to the holder's use, or to divest the true owner of his property." These charges the court separately refused to give, and to each refusal the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appeals to this court, assigning the charge given and the refusal to charge as requested, as error.

ROBINSON & DENSON, for appellant.

CICERO D. HUDSON, *contra*.

BRICKELL, C. J.—The title to the mule passed to Hodges, under the contract in writing given in evidence, subject to be divested on the payment by the vendors of the sum expressed, on or before the 1st October, 1875. Until that condition was fulfilled, Hodges was the absolute owner, entitled to possession, and if the vendors were permitted to remain in possession, they were merely tenants at his will. If a *bona fide* purchaser from Cottle would have been protected against the title of Hodges, the appellant does not stand in that position, and cannot claim the protection. Whether he had notice of the sale to Hodges is unimportant. He paid or parted with nothing of value for the mule, and is the mere voluntary donee of Cottle, having no other or greater right than he had. The claim of a greater right, and the assumption of ownership, using the mule as if he was owner, was illegal, and a conversion for which trover will lie. No demand was necessary, for his possession originated tortiously, and was adverse to that of the true owner.

The first instruction requested by the appellant was properly refused. The second may state the law correctly in a proper case; but in this case it was properly refused.

Affirmed.

[Wright v. Paine, Adm'r.]

Wright v. Paine, Adm'r.

Action on Receipts.

1. *Deposit; contract of, how construed.*—The contract made by the deposit of money, like any other, must be interpreted in the light of the circumstances surrounding the parties, and their relations to each other, at the time it is entered into; these often furnish the most satisfactory solution of the contract, when its character is uncertain or its terms inapt.

2. *Special deposit; what is.*—In the absence of any evidence of the character of the business, in which the depositary was engaged, or other extrinsic facts aiding in the construction of the writing, an instrument signed by the depositary, by which he acknowledges that a third person has deposited with him for "safe keeping" a certain number of dollars in gold coin, which the depositary is to "return whenever called for," will be held to be a special, not a general deposit.

3. *Limitations; statute of, when commences to run.*—In the absence of any evidence of any extrinsic fact, aiding in its construction, a writing by which the depositary acknowledges to have received a certain number of dollars in gold "on deposit, to be paid" to the depositor "on demand"—will be held not to be a contract of bailment, but a loan of money, payable presently or on demand; and the statute of limitations will commence to run against it, not from the date of the demand, but from the date of the writing.

4. *Demand; when must be made.*—Where a demand is essential, as a condition precedent to an action, it must be made in a reasonable time; the party bound to make it can not postpone it indefinitely, and thereby keep alive claims which would otherwise become dormant and stale; and what is a reasonable time within which to make demand, depends very greatly on the circumstances of the particular case.

5. *Delay; what is unreasonable.*—Where a special deposit of coin was made for safe keeping, and more than seventeen years elapsed, the death of the depositary intervening more than two years, before suit was brought, and eleven years elapsed after the deposit before demand was made for its return, the delay, in the absence of all explanation, was unreasonable.

APPEAL from DeKalb Circuit Court.

Tried before Hon. LOUIS WYETH.

The appellant, William H. Wright, brought this action, on the 17th day of November, 1874, against the appellee, Benjamin F. Paine, as the administrator *de bonis non* of the estate of William O. Winston, deceased, and sought to recover on the following receipts, to-wit:

"Deposited with me, for safe keeping, by William H. Wright, eight hundred and five dollars (\$805) in gold, which I am to return whenever called for, this 4th day of November, 1857. (Signed) WM. O. WINSTON."

Upon this receipt was the following endorsement:

"Presented for settlement, April 20th, 1872.

J. N. WINSTON, Adm'r of estate of WM. O. WINSTON."

The second receipt is as follows:

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"Received, January 25, 1858, of Wm. H. Wright, forty dollars in gold, on deposit, to be paid him on demand (\$40).

(Signed) W. O. WINSTON, per J. N. WINSTON."

This receipt was also presented to the administrator on the 20th of April, 1872.

The original complaint contained no averment of demand, but simply charged that the money due on receipts was still unpaid. An amendment, averring a demand on Winston in his lifetime, was subsequently made.

The case was tried on pleas of the statute of limitations, non-assumpsit, payment and set off.

One Hamman, a witness for plaintiff, testified that in February, 1869, at the residence of the plaintiff, he heard plaintiff demand of W. O. Winston the money claimed on the receipts, and that said Winston then and there promised to pay or return the gold, saying that it was buried. Two other witnesses testified that they were both intimately acquainted with W. O. Winston, and that they both had conversations with him, soon after the late war, in relation to loss and destruction of his property, and that said Winston said that he had fooled the Yankees and they had not found much of his money. J. N. Winston, a witness for defendant, testified that he was present at the house of plaintiff on the occasion testified to by the witness Hamman, and that he heard no demand made by plaintiff. This was, in substance, all the evidence, and the court, of its own motion, charged the jury: "1. In the case of a deposit of money in gold, silver, or bank notes, which are called and pass as money, the relation of creditor and debtor exists—and this whether the deposit is proven by verbal or written evidence. 2. When a deposit of money is made, the law implies the promise to return or repay it on demand, and an express promise, either verbal or written, is nothing more, and makes the legal obligation no greater or stronger. 3. Upon a deposit of money, returnable or payable on demand, a right of action, or right to sue, immediately attaches. 4. The statute of limitations commences to run as soon as the right of action accrues or commences. 5. In this case the statute of limitations of six years, if pleaded, is a bar to the plaintiff's recovery, if six years have elapsed from the date of the receipts before the suit was brought, and in computing the time you must not count the time from January 10, 1861, to September 23, 1865, four years, eight months and thirteen days. 6. A different rule exists in relation to personal property, other than money; for instance, if one deposited a horse with another, to be returned on demand, then the statute would not begin to run until demand made. But money is

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a peculiar species of personal property, in regard to which a different rule prevails, as I have above stated." To each of these charges the plaintiff duly excepted, and requested the following written charges: 2. That under said receipts, the plaintiff had no right of action until demand made by Wright of Winston for the money. 3. That the statute of limitations did not begin to run until after demand made. These charges the court refused to give, and plaintiff excepted. There was a verdict and judgment for the defendant, and the plaintiff brings the case here by appeal, assigning the charges given and the refusal to charge as requested, as error.

W. J. HARALSON, and BRAGG & THORINGTON, for appellant.

M. J. TURNLEY, *contra*.

BRICKELL, C. J.—“In the ordinary cases of deposits of money with banking corporations, or bankers, the transaction amounts to a mere loan or *mutuum*, or irregular deposit, and the bank is to restore, not the same money, but an equivalent sum, whenever it is demanded.”—Story on Bailments, § 80; *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58. It is insisted for the appellant, there is a distinction between a deposit with banks or bankers, and with an individual not engaged in banking. While a deposit with the one, not expressed, or shown by circumstances to have been a *special* deposit, will from the nature and character of the business of the depositary, and its usual course, be regarded as *general*, creating the relation of debtor and creditor—a deposit with the other will be presumed, in the absence of evidence to the contrary, as *special*, creating only the relation of bailor and bailee. The authority which is relied on to support the proposition, does not seem to assert it so broadly. The evidence of the deposit in that case, and of the agreement between the parties, was verbal, and it was shown that they stood in the relation of employer and overseer, the latter depositing bank notes with the former for *safe-keeping*. The relation of the parties, the expressed purpose of the deposit, the fact that the depositary was not engaged in any commercial business, were circumstances which the court held were proper for the consideration of the jury, in determining whether the deposit was *general* or *special*.—*Duncan v. Magette*, 25 Texas, 246. Beyond this we do not understand the decision to extend, and to this extent it is consistent with our own case of *Derrick v. Baker*, 9 Port. 362. But neither case asserts that the character of business in which the depositary may be engaged, necessarily determines the character of the deposit.

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Contracts, verbal or written, are interpreted in the light of the circumstances surrounding the parties, and their relations to each other when they are formed. These circumstances and relations, often aid materially in ascertaining the intention of the parties, and when the character of the contract is uncertain, when its expressions are inapt, may enable the court more satisfactorily to determine what are the obligations it imposes or the rights it confers. If there was nothing more in a transaction resting entirely in parol, than that a farmer, having money, should deposit with a neighbor engaged in the like and no other pursuit, or in no business requiring the frequent use of money, and the deposit was expressed to be for *safe-keeping*, the jury within whose province it would lie to determine whether the deposit was *general* or *special*, would probably conclude that it was *special*, that the purpose of the depositor was the *safe-keeping* of the money, and the duty and liability of the depository was to *keep safely*. But if the depository was a merchant, whose business required the frequent use of money, and he was in the habit of receiving money on deposit, there would be more hesitation in pronouncing the deposit *special*—that the depository could not use the money—that the title to it remained in the depositor, and if it was lost, he must bear the loss, unless fraud or gross negligence could be imputed to the depository.

The transaction between these parties does not rest in parol—the contracts are in writing, and if the circumstances under which they were made, the relations then existing between the parties, or any other extrinsic fact which could properly be considered, would aid in determining the character of the contracts, no evidence has been given of them. The construction they must bear, depends wholly on the terms in which they are expressed.

The first in point of time, expresses a deposit of a certain sum in gold, and that the purpose is for *safe-keeping*, and that it is to be *returned whenever called for*. The gold is not shown to have been in a sealed package, in a bag, or in a box or chest, nor marked so as to be capable of being separated from other like coin, and of identification, nor is the character or denomination of the coin stated. The promise is unconditional, to *return it whenever called for*—there is no contingency provided by the contract, in which obedience to this promise can be excused. If the transaction was with a bank, banker, or a dealer in money, or with a merchant, or other person engaged in business requiring the frequent use of money, and in the habit of receiving money on deposit, the presumption would be, probably, that the writing im-

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plied a *general*, not a *special* deposit. Such a deposit would be most advantageous to the depositor—the gold would cease to be his property, and if lost by any casualty, whatever may have been the diligence of the depository, the obligation to repay it in kind would be absolute. The presumption would also be consistent with the course and usages of business.—*Darson v. Real Estate Bank*, 4 Pike (Ark.), 297; *Foster v. Essex Bank*, 17 Mass. 477; *Conn. Bank v. Hughes*, 17 Wend. 94. The writing expressing that the purpose of the deposit was *safe-keeping*, would scarcely be sufficient to repel the presumption. But we are without the aid of evidence of the character of the business in which the depository was engaged, or of any extrinsic fact which would aid in the construction of the writing. Every clause and word of a contract, must have assigned to it some meaning, if possible, and it is not to be presumed parties have deliberately or carelessly employed idle, unnecessary, or unmeaning words and expressions. Construing the instrument by its words alone, we conclude that the *safe-keeping* of the gold was the purpose of the deposit, and the duty imposed was *safely to keep*, and to return *in individuo* when demanded. The deposit was therefore *special*, not *general*.

The other writing is in form of a receipt, and expresses the gold is *payable on demand*. The only duty imposed is the *payment on demand*. There is not, as in the former writing, an express agreement to keep safely, nor any words which are inconsistent with a loan, payable on request. That the money is stated to be received on *deposit*, was, most probably, intended to indicate that it was not a loan bearing interest. Giving due significance to all the words of the writing, and that its terms import a *payment*, not a *return* of the identical money, the contract is not a bailment, but a loan of money, payable presently or on request—a written promise for the payment of a certain sum of money, absolutely and unconditionally, imposing no other duty or obligation than payment, is a promissory note.—*Woolfolk v. Leslie*, 2 Nott & Mc. 575. A promissory note, or other writing for the payment of money on request, or presently, or on demand, is subject to the statute of limitations, and the bar of the statute is computed, not from the day of *demand*, but from the *date* of the note or writing.—Ang. Lim. § 95; *Owen v. Henderson*, 7 Ala. 641; *McDonnell v. Br. Bank*, 20 Ala. 312; *Kimbro v. Waller*, 21 Ala. 376. In all its material features, the writing we are construing is not distinguishable, in legal effect, from that which was considered in *Owen v. Henderson*, *supra*, and held from the day of its date, within the operation of the statute of limitations. Adhering to that decision,

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we must pronounce that the action, so far as founded on this instrument, was within the bar of the statute. The oral declarations made by Winston in 1869, if clearly proved, and if regarded as an unqualified admission of an existing liability, embracing the last instrument, which he was willing to pay, would not remove the bar of the statute, or prevent it from attaching subsequently. The bar of the statute can be avoided only by a partial payment made before the bar is complete, or an unconditional promise in writing.—Code of 1876, § 3240.

As to the other instrument, creating the relation of bailor and bailee, and not that of debtor and creditor, it may be conceded that in the absence of circumstances excusing it, a demand, or something equivalent to it, was a condition precedent to an action founded on it. The demand is for the protection of the bailee, and to save him from the vexation of suit when he may not be in default. When a demand is essential, as a condition precedent to an action, it must be made in a reasonable time. The party bound to make it, can not postpone it indefinitely, and by his procrastination keep alive claims that would otherwise become dormant, and grow stale, the enforcement of which would be offensive to the policy of the law and dangerous to the rights of his adversary. In the case of *Codman v. Rogers*, 10 Pick. 119, it was said by Wilde, J.: "Generally, where a debt is payable in money and on demand, the statute of limitations begins to run immediately after the debt is contracted; but if a demand previous to the commencement of an action is necessary, the statute will not begin to run until a demand is made. But in the latter case, there must be some limitation to the right of making a demand. A party must not be permitted to sleep over his rights, to the prejudice of the party on whom he makes a claim, and who by the delay may be deprived of the evidence and means of effectually defending himself. A demand must be made within a reasonable time; otherwise, the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose, does not appear to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand, that there is for hastening the commencement of the action; and in both cases the same presumptions arise from delay." In the case of *McDonnell v. Br. Bank*, *supra*, which was an action against the clerk of a court for money collected on a judgment, it

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was held the action was not maintainable without proof of a demand, or of a conversion, but it was also held, the demand must be made in a reasonable time after the collection, to avoid the operation of the statute of limitations. What would be considered a reasonable time, it was said, could not be settled by any definite rule, capable of application to all cases, but must depend upon the circumstances peculiar to each case.

If there be any facts or circumstances which can excuse the long delay of the appellant in commencing suit, and in making demand for the money, the record does not disclose them. More than seventeen years elapsed after the special deposit, the death of Winston intervening for more than two years certainly, the precise time not appearing, before suit is instituted. More than eleven years, before any demand for its return was shown. It is almost incredible, that the appellant should have permitted such a sum to remain so long in Winston's hands, without an effort to reclaim it, or an inquiry as to its safety, especially when there is an absence of any fact indicating any peculiar relation between them, inviting confidence, and the indifference, or security, which it may beget. The demand was made, and nearly six years is permitted to elapse, the death of Winston intervening, before suit is brought, and no explanation of this delay is afforded. It would be a dangerous precedent; it would endanger the estates of the dead; it would render the rights of the living uncertain and insecure; it would open the door for the introduction of stale claims, which it has been well said, have often more of cruelty than justice in them; and it would be violative of the policy of the statute of limitations, and defeat the purposes it was intended to accomplish, if without an explanation of the long delay in making demand, and the unwarrantable delay in bringing suit, after the fruitless demand, until Winston was dead, the statute was held not a bar. The statute is now affirmatory of the principle of these decisions. It declares: "When a right exists, but a demand is necessary to entitle the party to an action against any officer, agent, or attorney, the limitation commences from the commission or omission of the act giving the right of action, and not from the demand."—Code of 1876, § 3241.

The instructions given by the Circuit Court may not have been influenced by these considerations, and it may have erred in its construction of one of the writings. The error has worked no injury to the appellant, for the statute of limitations, under the facts, was, in any aspect of the case, a bar to the action, and this was the substance of the instruc-

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tions given. Whether given for a right or a wrong reason, is not material.

The judgment is affirmed.

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Bill in Equity to set aside Fraudulent Conveyance.

1. *Fraudulent Conveyance; jurisdiction of equity to relieve against.*—A court of equity has original jurisdiction to relieve against conveyances obtained by fraud, or undue influence; and it is no objection that, in the particular case, there may be a concurrent remedy at law.

2. *Same; right of administrator to assail.*—The administrator has such a right in the lands of his intestate, as will enable him to maintain a bill in equity for the cancellation of a conveyance of the lands obtained by fraud, the heirs being made parties.

3. *Conveyance; what presumptively fraudulent.*—Where the grantor and grantee sustain relations of trust and confidence, such a principal and agent and the like, any transaction between them will be narrowly watched and closely scrutinized by a court of equity, and relief will be granted against contracts entered into between them, unless the party claiming the benefit of the contract shows by clear and convincing proof that he acted with perfect good faith, and did not abuse or betray the confidence reposed in him; and where the donee is of superior mental capacity, or the donor of weak or feeble intellect, the presumption of fraud will require stronger evidence to remove it.

4. *Conveyance; what fraudulent.*—In this case the court holds that the following facts justify a decree of cancellation: In 1867, the husband of intestate decedent to her his entire estate, real and personal, and died in 1870. They had no lineal descendants. Twelve days after his death, she executed to Lanier an unqualified power of attorney to transact her business, discharging at the same time a person who had acted as agent for her husband in his lifetime, and for her up to that time. The appellee, Lanier, was indebted to her husband in his lifetime and the indebtedness was transferred to her. The intestate of appellant was near ninety years of age, partially paralyzed, her mind enfeebled and her body diseased. Shortly after the execution of the power of attorney, Lanier removed her to his house, and he and his family paid great attention to her. While sustaining these relations, a deed is executed which conveys to Lanier all the property of intestate, upon a purely voluntary consideration. This deed is prepared by an attorney, at the request of Lanier, who at the same time directs the preparation of an obligation to support intestate during her life; but it is not shown whether this obligation was ever executed or not. STONE, J., dissented.

APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill filed by the appellant, James F. Waddell, as the administrator of Ann Campbell, against the appellee, E. F. Lanier and Mary E. Hopkins, as the sole heir-at-law of said Ann. The bill seeks a cancellation of a certain deed of gift made by Ann Campbell in her lifetime to the appellee,

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Lanier, and for an account of the property which had come to his hands by virtue of said deed. The lands conveyed in the deed were situated in Chambers county. Lanier was a resident of Georgia, and Mary E. Hopkins resided in Russell county, Alabama. The bill was originally filed in Russell Chancery Court, and was, by consent, transferred to the Chancery Court of Lee county, subject to any defense which could have been made against it in Russell county. The bill alleged that Lanier had, by fraud and undue influence, procured the execution of the deed by intestate of appellant, who was an old lady ninety years of age, and of feeble bodily and mental health. The facts relied on to sustain this allegation are fully stated in the opinion of the court. The bill was demurred to by Lanier for want of equity, for multifariousness, and because it was filed in the Chancery Court of Russell instead of Chambers county. This demurrer was overruled. Lanier also filed a sworn answer as required by the bill, in which he specifically and pointedly denied every charge of bad faith, undue influence, and fraud. On a final hearing the Chancellor dismissed the bill, and this appeal is prosecuted from that judgment.

HOOPERS & WADDELL, for appellant.

W. H. DENSON, and CLOPTON, HERBERT & CHAMBERS, *contra*.

BRICKELL, C. J.—A court of equity has original jurisdiction to relieve against conveyances of real or personal estate obtained by fraud or undue influence, or an abuse of confidence; and it is no objection to the exercise of the jurisdiction, in the particular case, that there may also be a concurrent remedy at law. The cancellation of the conveyance, which a court of equity alone can decree, and an adjustment in the same suit of matters of account, which necessarily exist in nearly all cases of the kind, render the remedy in equity more adequate than any which can be pursued at law. *Rumph v. Abercrombie*, 12 Ala. 64. The jurisdiction must be invoked by a proper party, for no court of law or equity can grant relief against the conveyance, except at the suit of a party having an interest affected by it, or a title to complain of it. The personal assets of an estate, by operation of law, or the grant of administration, vest in the administrator, and if the conveyance is of personal property, he has the interest affected by it and title on which to seek relief against it. The statutes may not confer on him an estate or interest in the lands of the intestate, but they clothe him with an authority to rent and to obtain orders for the sale of them, to the

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exercise of which possession is necessary. The right of possession enables him to maintain ejectment or other appropriate action at law, for the recovery of possession when it is unlawfully withheld.—*Masterson v. Girard*, 10 Ala. 60; *Golding v. Golding*, 24 Ala. 122; *Russell v. Erwin*, 41 Ala. 292. The same right will enable him to maintain a bill in equity for a cancellation of a conveyance of the lands of the intestate obtained by fraud, the heirs being made parties. The demurrer to the bill was not well taken, and ought to have been overruled.

We are then to consider whether the present conveyance from the intestate to the appellee, Lanier, was executed under such circumstances as require a court of equity to pronounce a decree of cancellation. It being an undisputed fact, that the conveyance is not founded on an adequate consideration of value, but is purely voluntary; and that at, and prior to its execution, the relation of principal and agent existed between the intestate and the appellee—that under a power of attorney unlimited in its terms, subject to no limitation except such as the law would imply, she had delegated to him the custody of her estate and the management of her affairs, the principles to the test of which the validity of the conveyance must be subjected can not be matter of doubt or controversy. All transactions between trustee and *cestui que trust*, guardian and ward, attorney and client, principal and agent, parent and child, are narrowly watched and jealously scrutinized in courts of equity. In all the variety of the relations of life, in which confidence is reposed and accepted, and *dominion may be exercised by one person over another*, the court will interfere and relieve against contracts or conveyances, when they would abstain from granting relief, if no particular relation existed between the parties, in which trust and confidence was reposed and accepted, and there was not an opportunity for an abuse of the confidence and the exercise of undue influence. Though in this class of cases there are often marks and traces of direct and positive fraud, of artifice, imposition, overreaching and unconscionable advantage, the principle on which the court proceeds, in granting relief, does not depend on the existence of such facts. Relief is granted, not because there is actual fraud, but on a principle of public policy, to prevent fraud, and to remove all temptation for its commission.—1 Story's Eq. § 307. The principle is thus stated by Judge Story: "It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a man, whereby he strips himself of his

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property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases, as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relation between the parties, which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But, when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence. The general principle, which governs in all cases of this sort, is, that if a confidence is reposed and that confidence is abused, courts of equity will grant relief."—1 Story's Eq. § 308.

The relation of principal and agent, is affected by the same considerations which influence the court in dealing with transactions between persons standing in other fiduciary relations, and the same learned judge and author says: "It is therefore for the common security of all mankind, that *gifts procured by agents*, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion. And, indeed, considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed whether it would not have been wiser for the law in all cases to have prohibited them; since there must always be a conflict between duty and interest on such occasions. Be this as it may, it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals; or, by abusing their confidence, to acquire *unreasonable gifts or advantages*; or, indeed, to deal validly with their principals in any case, except when there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition."—1 Story's Eq. § 315. A principle applying in all this class of cases, is, that on the person claiming under the contract or gift, rests the burthen of

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proving satisfactorily, that it is just, fair and equitable in every respect, and not on the party seeking to avoid it, to establish that it is fraudulent.—1 Story Eq. § 311; *Bony v. Hollingsworth*, 23 Ala. 690. In this case, it is said: "There may be no fraud; every thing may be honest and fair; but until the act is satisfactorily accounted for, the inference of fraud, artifice, or abuse of confidence, is so strong, that we think equity should relieve against it." The annotators of the Leading Equity Cases, thus state the rule: "Where the circumstances are such as to give rise to an inference of undue influence, the burden of proof is on him who claims under the deed or transfer, to rebut the presumption, and show that the gift was not obtained through means which the court must condemn. It should, consequently, appear—

1. That the donor understood and knew what he was doing.
2. That the act proceeded from his own mind, or if the suggestion come from without, that it was deliberately adopted by him; and, finally, that if in carrying out his purpose, he reposed a confidence in another, or relied on him for guidance, that the latter did all which the acceptance of such a trust implies, viz: giving the advice and information which, if duly weighed, might operate to prevent the execution of the act."—2 Lead. Eq. Cases, 4 Am. Ed. 1194. In *Hunter v. Atkins*, 3 Myl. & K. 113 (8 Cond. Eng. Ch. 314), the rule is thus stated by Lord Brougham: "I take the rule to be this: There are certain relations known to the law as attorney, guardian, trustee; if a person, standing in these relations to client, ward, or *cestui que trust*, takes a gift, or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge which he himself knew. In short, the rule, rightly considered, is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation." In the application of this principle, which controls a court of equity in determining the validity of such transactions, it is not essential that the donor should be of unsound mind, or of feeble, or impaired intellect. Unsoundness of mind, if reaching insanity, or reducing the donor to idocy, would of itself avoid the contract or gift. Feebleness of intellect, or its diminution, or infirmity, from age, disease, or other cause,

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would be a circumstance of importance, if the inquiry was directed to the existence of actual fraud. The experience of life shows that an artful, designing man, may obtain a controlling influence over one whose intellect is superior to his own."—*Rhodes v. Bate*, 1 Ch. Ap. 252; *Todd v. Grove*, 33 Md. 188. But there can be no doubt, if the donor has intelligence, force of character, resoluteness of will, and knowledge of the character of the transaction is traced to him, the presumption of undue influence is materially lessened. While feebleness of intellect, irresolution of character, vacillation of will, increase the presumption, and require that it should be repelled by stronger and more conclusive evidence.

With this statement of the principles, to the test of which the validity of this conveyance must be subjected, we will inquire, if it is shown by the grantee, that it is just, fair and equitable—that he dealt with the principal, exactly as a stranger would have done, putting her on her guard, gaining no advantage from the relation, beyond the natural and unavoidable consequence of kindness.

The prominent facts are that the husband of the intestate, in 1867, of which the appellee had knowledge, conveyed to her by deed all his real and personal estate, of the value of not less than eight thousand dollars. They were without descendants, and their only known relation was a niece of the intestate, residing from her a distance of about thirty miles. The husband died in 1870, and twelve days thereafter, the intestate gave the appellee the power of attorney to which we have referred. There is no evidence that the intestate had ever seen the appellee more than once before the execution of the power of attorney is suggested, and that was during the life of the husband, when he visited him, the only time he was ever at the husband's residence. The appellee was indebted to the husband, (and the indebtedness was transferred to the intestate,) in a sum exceeding thirty-one hundred dollars. The intestate was near, if not full ninety years of age, partially paralyzed, her mind enfeebled, and her body diseased. The power was executed at the suggestion of the appellee, and after his representation that her business, which seems to have been entrusted to Hill, was not in safe hands. It is drawn with care and skill, but by whom, or where, or who gave the instructions for its drawing, is not shown. After its execution, the appellee and his family were assiduous in their attentions to the intestate; and at their residence, some seven or eight miles from her place of residence for near thirty-five years, away from her old acquaintances, with comparative strangers, she is induced to spend the greater part of her time. A single visit is made

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to her niece, and then she is accompanied by the appellee. The rents and profits of her lands, the appellee takes under his control as her agent, collecting debts due her, and making sales of cotton remaining on the premises at the death of the husband, but so far as is shown by the evidence, no account was ever rendered to the intestate, nor did she make any inquiry as to his management, or as to the disposition of any moneys made by the appellee. There was unlimited confidence reposed and accepted. The agency continuing, the conveyance is prepared by an attorney, having no acquaintance with the intestate, who had never spoken to her, and never saw her but once, and then at a distance. The request, and instructions for its preparation, are communicated to the attorney by the appellee alone, and at the same time is drawn an obligation by which he covenanted to support and protect the intestate during life. The conveyance and the covenant are delivered to the appellee; and the conveyance is executed at his residence, in the presence of, and attested by, witnesses of his selection. At the time of its execution the intestate said, according to the evidence of one of the subscribing witnesses, she wanted and intended the appellee to have *that property, to pay him for what he had done, and to pay him for taking care of her when she got so she could not take care of herself.* The other witness says she expressed her gratitude for the kindness of the appellee, and said she intended he should have her property, *that he was to take care of her.* The recital of consideration in the deed is, "of the sum of ten dollars to her in hand paid by the said E. F. Lanier, as well as in consideration of the esteemed friendship and affection the said Ann Campbell bears to the said Lanier, for his kindness and childlike devotion to her." It strips her of all property, and rights of property, and contains no covenant or stipulation binding the appellee to her support; and if the separate covenant prepared by the attorney, at the time of preparing the deed, was ever executed or delivered, it has not been proved.

The only explanation of the motives of the deceased for the execution of the conveyance, is affection for the appellee, inspired by his kindness to her in her last years. The same explanation has been attempted in nearly all the cases in which conveyances of this character have been assailed. Affection to the appellee was not the only motive with the intestate for the execution of the conveyance. Security to herself of a comfortable support was also a motive. The appellee must have promised to afford her such security, otherwise he would not have caused the attorney who drew the deed under his supervision and instruction, to draw a

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covenant or obligation binding him to her support. Why this instrument was not executed at the same time of the execution of the deed, or why it was never executed, is unexplained. No faithful agent would without advising against it, when it was within the line of his duty, have permitted a principal, aged, infirm in body and intellect, to have parted with his entire estate, absolutely and unconditionally, reserving no means of, and no security for a support, without at least advising against it. Certainly, he would have been unfaithful, if he had been active in encouraging and promoting the act. We do not propose dwelling further on the facts. No conveyance ever fell more directly within the principles on which such conveyances are pronounced fraudulent; and it is not "possible for a court of equity, consistent with its rules and principles, and the landmarks of its authority for ages together, to admit of its standing."—*Wells v. Middleton*, 1 Cox Ch. Cases, 118.

The decree of the Chancellor must be reversed, and this court, proceeding to render the proper decree, doth order, adjudge and decree, that the conveyance executed by Ann Campbell to the appellee, Lanier, of date July 20, 1872, attested by G. W. Moore and T. J. Kennedy, and acknowledged before T. J. Kennedy as notary public of Chambers county, is null and void. And within ten days after notice of this decree, to him or his solicitor of record, the appellee Lanier will surrender said deed to the register of the Court of Chancery, who will cancel the same.

It is further ordered, adjudged, and decreed, that within ten days after this decree, the said appellee Lanier surrender to the appellant possession of the lands described in said conveyance, and on his failure or refusal so to do, the register, on the request of the appellant, will issue a writ of assistance, directed to the sheriff of Chambers county, commanding him to place the appellant in possession of said lands. If the appellee, or any tenant of his, has a crop growing on said premises, the execution of said writ of possession may be stayed, on the execution of a bond payable to the appellee, with two good and sufficient sureties, for the payment of the rent of the present year.

It is further ordered, adjudged and decreed, that it be referred to the register to take and state an account against the appellee, Lanier, of the rents and profits of said lands, annually, from the 5th day of April, 1870, to the time possession may be surrendered to the appellant, computing interest on such rents from the expiration of each year, first crediting the appellee with all taxes on said lands he may have paid, and with the value of all necessary repairs and

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improvements, if any, he may have made, and then ascertaining the balance.

It is further ordered, adjudged and decreed, that said register take and state an account of all personal property and its value, of all choses in action, and of all moneys the appellee may have received under said conveyance, or as agent for the intestate, or from, or as the agent of James Campbell, in his life. That said appellee be charged with the value of all such property, other than choses in action and money, at the time it was received by him; and with all such of the choses in action as he may have collected, or which he may have failed to collect from a want of diligence, and with all moneys owing by him to the intestate, or to said James Campbell in his life, and that interest be computed on the value of said personal property, from the time it was received, and on such choses in action from the time of their collection, and on the moneys from the time they may have been received; and will allow him a credit for all moneys necessarily expended for said Ann Campbell, with interest from the time they may have been paid out; then ascertaining the balance. In executing the reference the register may use the evidence on file and may receive such other legal evidence as the parties may introduce. And the register will report his action, under this decree, to the Chancellor for confirmation. The appellee, Lanier, must pay the costs of this appeal in this court, and the costs of the Court of Chancery.

STONE, J.—I agree fully with the Chief Justice in all he has said of the legal principles which govern this case. Both the original and amended bills are very full, and each has attached to it interrogatories that are full and exhaustive, and cover every phase of the transaction, as charged. Each calls for an answer from Lanier under oath, both as to the charging parts of the bills and to the interrogatories. The answers are very full, responding to every material averment and inquiry, and emphatically negative every charge or semblance of fraud, circumvention, and undue influence. If the answers be true, there is no ground on which the deed should be set aside. According to them, a more complete case of voluntary conveyance was never presented in a court of justice. The complainant had the option of making Lanier a witness, by calling for a sworn answer, and he chose to exercise it. Doing so, he has expressed confidence in him, and has thus placed himself at the disadvantage of being required to overcome the denials in the answer by the testimony of two witnesses, or one with corroboration.—1

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Brick. Dig. 738, § 1466. Has he done so? Examining the evidence, it must be confessed that the average intelligence of defendant's witnesses stands above that of complainant. The complainant submitted his cause on the pleadings, and ten depositions. The defendant, on pleadings, and eight depositions. Three of defendant's witnesses were physicians of many years practice. The testimony, altogether, shows beyond peradventure that Mrs. Campbell had sufficient mental capacity to make a deed; and the witnesses who attested it, prove that at the time she executed it, she fully comprehended its terms, and carried out her own wishes in executing it. Other witnesses prove her previously and subsequently expressed purpose to so convey her property. These acts and declarations were in the absence of Lanier. Lanier denies positively that the deed was made at his instance or request, and there is an entire absence of proof to overcome this denial, or to show that a word or hint ever escaped him, tending in the least to show that the deed was of his procuring. True, Lanier was kind and tender in his attentions to Mrs. Campbell. He was her agent, and had charge of all her business. The proof fully shows that Mr. Campbell, husband of Mrs. Campbell, before his death, which had then recently occurred, had great confidence in and friendship for Lanier—shown by repeated declarations of Campbell, by depositing his money with him for safe keeping, and by making Lanier's business house his stopping place when he visited the village. The uncontested facts furnish very ample reason why Mrs. Campbell, in her then lonely condition, should desire to have Lanier for her agent. The known confidence in him indulged by her husband, then recently deceased, and whose memory she cherished, would most naturally suggest him as the most suitable person to be her agent.

It is objected, however, that Mrs. Campbell first appointed Hill to be her agent, and very soon afterwards displaced him, when she appointed Lanier in his stead. There is much proof in the record of Mr. Campbell's distrust of Hill's solvency and trustworthiness, although there is some the other way. The record contains proof that Hill was embarrassed, and there is no attempt to prove the contrary. If it be objected that Lanier betrayed indecent haste in accepting the agency of Mrs. Campbell's business so soon after the death of her husband, the answer is that Hill exhibited still greater haste; for he was appointed several days before Lanier was. I do not think there is any thing in this objection; for Mrs. Campbell needed the services of an agent immediately.

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None of the testimony shows that either Mr. or Mrs. Campbell left any known relative, except Mrs. Hopkins, Mrs. Campbell's niece. There is proof, even in the testimony for complainant, that she became dissatisfied with Mrs. Hopkins long before she made the deed to Lanier. There is an entire absence of proof as to the cause of this dissatisfaction, unless it be shown in the testimony of complainant's witness, to the effect that Mrs. Campbell had learned or heard that Mrs. Hopkins had said she was going to have all of Mrs. Campbell's property she could get. Such remark is apt to offend. We are entirely uninformed whether Mrs. Hopkins made this remark, generally regarded as unfeeling; or how Mrs. Campbell was informed she had made it. If Mrs. Campbell believed her niece had so expressed herself, the probable tendency was to cool her affection for her. There is, then, nothing left but the kind offices and tender attentions shown by Lanier to this aged lady, the lonely relict of his confiding friend, on which to rest the charge of fraud, undue influence, or abused confidence. Is it enough to overcome the responsive denials in his answer? Are acts of kindness, child-like attention, if you please, badges of fraud? Tenderness to the aged has always been regarded as one of the virtues of a high civilization; and gratitude a common instinct of humanity, the want of which deserves and receives universal condemnation. Shall the one be denounced as covinous, and the other reprobated, and its legitimate expression nullified, for no other reason than that in this transaction, humanity is exhibited in its highest and most ennobling attributes; and this, over the unimpeached and unassailed testimony of the defendant's denials in his answer, which the complainant made evidence for him, and offers nothing but defendant's kind offices to overturn? I fully adhere to the principle that confidence acquired shall not be betrayed, but am unwilling to carry it to the extreme length of repugning or condemning the gentler amenities of a refined and elevated civilization.

It is objected that the record fails to show that Lanier executed the agreement, binding himself to support Mrs. Campbell during her life. If this question was mooted in the court below, the record does not inform us of it. But there are other answers to this objection. I do not understand it to be denied by the Chief Justice that Mrs. Campbell was of sound mind, capable of making a binding contract, and it follows that this contract can not be annulled on the ground of her mental imbecility. The only subject of inquiry is, did Lanier abuse the trust and confidence she reposed in him? And did he execute his part of the mutual agreement? The first branch of this inquiry is answered above. In

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regard to the second branch, if Lanier's failure to bind himself to support Mrs. Campbell is a good ground for setting aside her conveyance now, it was equally good and available to her in her lifetime. If she had sought to rescind on that ground, it would have been a complete answer to the suit for Lanier to show a readiness, willingness, ability and offer to execute such contract, and to support Mrs. Campbell during her life. And, having done all he agreed to do, in supporting Mrs. Campbell during her life in a style suited to her tastes and social standing, if a suit were brought against him for a breach of his promise to execute a binding contract to support her, the recovery would at most be nominal. The gist of the undertaking was, not that he should bind himself, but that he should in fact support her. That being done, no actual injury has resulted to her from his failure, if fail he did, to execute the writing. The case is analogous to a sale and conveyance, with cotemporaneous agreement by the purchaser to execute a note for the purchase money. Should he fail to do so, but yet pay the purchase money according to the terms of the agreement, the vendor would have sustained no injury, and could neither rescind the contract nor recover for its breach. So, in this case, Lanier's failure to execute the agreement furnishes no cause of action, after he has performed all the agreement would have bound him to do. In any aspect in which I can view this case, I can not concur in the views of my brother, the Chief Justice.

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Bill in Equity to settle Partnership.

1. *Partnership; how may be created.*—In general, neither writing nor any other particular form is essential to the formation of a trading or laboring partnership, and like other contracts, it may be implied from conduct and circumstances, if significant and expressive enough to convince the mind of the intent and assent of the parties to the formation of that relation.

2. *Same; when equity will decree settlement of accounts of.*—It may be that under the statute of frauds, a partnership for the purchase and sale of lands as a business, is required to be in writing; but whether this be so or not, where partners, as an incident to their business, purchase and hold lands and pay for them with partnership funds, equity will treat such lands as moveable partnership property, whenever necessary for payment of debts, or the settlement of accounts between the partners.

3. *Statute of limitations; when commences to run.*—Where the partnership affairs are unsettled on a dissolution, and one partner, by written agreement with the other, leaves the partnership assets with him to dispose of, whenever

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he can do so at a fair price, a continuing trust is thereby created, and the bar of the statute of limitations will not begin to run against the right to an account of the partnership dealings, so long as the parties to whom the assets were delivered acts under the trust, or admits that it is still continuing.

4. *Witness; who. not competent.*—A former partner seeking an account and settlement of the partnership dealings against the administrator of a deceased partner in such case, is not a competent witness, in his own behalf, to prove any transaction by or statement with deceased, unless first called to testify thereto by the opposite party; and the fact that he was interrogated by the defendant as to *other* matters, does not vary the rule.

APPEAL from Etowah Chancery Court.

Tried before Hon. N. S. GRAHAM.

The bill in this case was filed by the appellant, Thomas H. Causler, against the appellee, W. C. Wharton, who is the administrator, and against the heirs of O. P. Hill, deceased. Its object is to have the affairs of a partnership, which had formerly existed between the appellant and Hill, settled and determined. The bill avers, and the proof shows, that the appellant and Hill, under the name of O. P. Hill & Co., commenced business as partners, doing a retail liquor business in 1847. The bill also avers that the partnership "traded in groceries, dry goods and other wares and merchandise, live stock, some slaves and some real estate." The bill also charges, and the proof shows, that some time in the year 1859, the partnership was dissolved and it was agreed that Hill was to "keep in his possession all the notes and accounts due the firm, as well as those running to maturity, and collect the same, and out of the proceeds to first pay the debts of the firm," and on the 9th day of January, 1860, Hill executed and delivered to appellant the following writing: "Whereas, the firm heretofore existing, known as the firm of O. P. Hill & Co., has been dissolved, and Thomas H. Causler being a member of said firm of O. P. Hill & Co., and as there is yet an undivided interest not disposed, of some of said property or effects in the name of O. P. Hill, and some in the name of O. P. Hill & Co., the interest in said property being equal, and the said Thomas H. Causler, desirous of removing west, leaves all of said property in the hands of his former partner to be sold, whenever he, the said O. P. Hill, can or may be able to do so at fair prices." Following this is a list of the property thus left in Hill's hands, which consists of lands and slaves and store-houses. The bill avers, and the answer admits, that Hill had sold portions of the property embraced in this agreement and had received the purchase-money, and made title to the purchasers. These sales are approved, and an accounting for the proceeds is prayed. It is also shown that Hill had collected various sums of money due the partnership, and that

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no accounting and settlement of the partnership had been had.

Some of the property which had belonged to said firm, is averred and shown to be still unsold and the title thereto in the name of Hill. As to such portion of the lands a partition is prayed. It was shown that Hill had made sales of some of the lands as late as 1869 or 1870, and that he had received rents up to the time of his death in 1871. It was also shown that soon after the execution of the agreement Causler left the State of Alabama and resided in the State of Texas until after the death of Hill, which took place in 1871 or 1872.

The chancellor at first ordered an account between the parties, and on this reference much testimony was introduced as to the general partnership affairs of Hill & Co., and as to Hill's action in relation to partnership affairs after Causler left the State. Causler was introduced by the defendant, Wharton, to prove the books of O. P. Hill, and after having testified that they were genuine and that he could perceive no alteration in it, he was asked, on cross-examination, the following question: "After the dissolution of the firm, in whose possession did these books go?" Respondent objected to this question, upon the ground that the witness was introduced to prove specific matters, and that the complainant had a right only to cross on what was brought out on direct examination. The Register overruled the objections, and respondent excepted. Witness then stated that he "left the books and all property of the partnership in the possession of Hill, who was to collect, close up the business of the firm and settle its indebtedness, &c. The proceeds were to be divided equally between us. The money on hand was kept by Mr. Hill to pay debts. He gave me \$1,800.00 out of the concern as part of my share. Hill obligated himself to give me \$1,800.00 at a certain time. If he did not have it belonging to the firm, he was to pay it out of his own funds, or I would give him the same amount. I got the \$1,800.00 in the winter of 1859. It was not paid me for my interest in notes and accounts of O. P. Hill & Co. Hill did not give the \$1,800 00 and one half interest in the lands mentioned in the bill for my interest in the notes and accounts of the firm." Witness was asked to explain how Mr. Hill was to be reimbursed after paying the \$1,800.00, and answered, "I do not know how it was."

The report of the testimony taken on the reference shows that the books of O. P. Hill & Co., and certain letters from Hill to Causler were introduced in evidence, but they do not appear from the transcript. One Woodliff, a witness for

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respondent, having testified to the sale of a negro by him to one of the firm of Hill & Co., and that he was unable to state to which one of the firm the sale was made, and that although he owed Hill & Co., he received the full price of the negro without any reduction, on account of his indebtedness to the firm, stated that Hill had informed him in 1867 that he (witness) owed Hill & Co., Hill & Sulser, and O. P. Hill.

The account, as stated by the Register, charged Hill's estate with his gross receipts of the partnership property, of all kinds, amounting in all to \$10,525.71, and gave him credits for disbursements to the amount of \$2,636.77, which does not include the \$1,800.00 paid by him to Causler just before the latter left the State in 1860. Causler is charged with receipts of partnership property to the amount of \$2,183.56, which includes the \$1,800.00 received of Hill, and is credited with expenditures on partnership account of \$22,594. The amount received by each, less his credits, is added together, that sum divided by two and the net receipts of Causler taken from his share as thus determined, and a balance reported in his favor of a little over three thousand dollars.

The chancellor, on final hearing, dismissed the bill, and the complainant brings the case here by appeal.

WATTS & SONS, for appellant.—The written instrument, signed by Hill, shows that he held the property in strict trust. A court of equity has exclusive jurisdiction over the trust and the partnership transactions. Under these circumstances there was no room for the statute of limitations, until there was some renunciation of the trust and an adverse holding brought home to the knowledge of Causler.—8 Porter, 211; 3 Ala. 756; 14 Ala. 315; 9 Leigh, 245; 8 Bligh, 352; 3 How. (U. S.) 333. Even if the instrument set out does not create the relation of trustee and *cestui que trust*, but only that of the tenants in common, the Chancery Court had exclusive jurisdiction to settle such matters, and the statute of limitations cannot apply.—2 Dev. Eq. 264; *Autry v. Freeze*.

AIKEN & MARTIN, *contra*.—The statute of limitations is a bar to the account sought by the bill.—*Bradford v. Spykers*, 32 Ala. 134; 12 Peters, 300; 6 Peters, 151; 11 Vesey, 286. The agreement made Hill and Causler tenants in common of the property embraced in it.—6 Pick. 374; 6 Serg. & Rawle, 338. The accounts for property, alleged to have been disposed of by Hill, are not sufficiently complex to justify the interference of a court of equity, and the complainant has a

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plain and adequate remedy by a suit at law in such instrument for its breach.—2 Brick. Dig. § 3, page 309.

STONE, J.—There appears to be no question that the copartnership first formed between Causler and Hill, had for its aim and scope the sale of liquors by retail. We think exhibit A to the bill shows that the partnership business was afterwards much enlarged, and that the copartners entered into a trading business, embracing lands and shares. Neither writing, nor any other particular form need be observed in the formation of a trading or laboring partnership. Mutual consent of two or more competent minds can make this, as it can make other contracts. And, like most other contracts, it may be implied from conduct and circumstances, if significant and expressive enough to convince the mind. There may be an exception to the generality of the foregoing remarks, in the matter of partnerships formed for the purchase and sale of lands, as a business. The statute of frauds may require that these shall be in writing.—See *Smith v. Burnham*, 3 Sumner, 435. But when partners, as an incident to their business, purchase and hold lands, and pay for them with partnership effects, equity treats such lands as moveable partnership property is treated, whenever it may be necessary for the payment of debts of the firm, or, for the adjustment and equalization of accounts between the partners.—*Dyer v. Clark*, 5 Metc. Mass. 562; 3 Kent's Com. margin 37 and note 3; *Hany, Adm'r v. Parmer*, August, 1877, in manuscript; *Howard v. Priest*, 5 Metc. Mass. 582. But we need not inquire whether this contract was originally formed, so as to bring the lands and their proceeds within the principles which govern partnerships. The agreement of Mr. Hill—exhibit A to the bill—takes the transaction without the influence of the statute of frauds, if it ever fell within it.—See, also, on the question of the equity of this bill, *Sanders v. Robertson*, in manuscript, Sept. 1877.

“Partnership, as between the parties themselves, is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of profits between them, and for the purpose of carrying on a legal trade, business or adventure.”—Collyer on Part. by Perkins, § 3. Chancellor Kent says: “Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions.”—3 Comm. marg. 23. We think it is fully shown that Causler and Hill were part-

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ners, and that their partnership transactions embraced sales of merchandise, and the purchase or ownership of lands, and possibly some other things.

We do not think the statute of limitations is a bar to the present suit. The agreement or obligation signed by Hill, shows that the joint or partnership dealings, at least to the extent of the property therein described, were not closed. Other witnesses speak of admissions made by Hill, that certain claims were of the partnership effects. The receipts, or obligation—exhibit A to the bill—furnishes written evidence that Causler had a continuing, unsettled interest in the property therein described; and that it was left in the hands of Hill, with authority to him to sell the same, whenever he might be able to do so at fair prices. It was evidently contemplated that this trust and power should continue until Hill could make sale of the property, and the proof shows that he continued to make sales, collect dues and rents, up to a short time before his death in 1871. The statute of limitations does not bar the claim set up in this bill for an account of the partnership dealings.—*Bradford v. Spyker*, 32 Ala. 134.

The receipt or agreement—exhibit A to the bill—contains the following clause, or recital: "As there is yet an undivided interest not disposed of—some of said property, or effects, in the name of O. P. Hill, and some in the name of O. P. Hill & Co.—the interest in said property being equal; and the said Thomas H. Causler, desirous of removing west, leaves all of said property in the hands of his former partner to be sold, whenever he, the said O. P. Hill, can or may be able to do so at fair prices. And the following is a statement of the property, both real and personal, to-wit;" going on to describe certain real property and two slaves. This recital, unexplained, would indicate that all other partnership property, real and personal, had been disposed of. Speaking of the eighteen hundred dollars which Causler admits Hill paid him on the eve of the former's leaving for Texas, he, Causler, says: "Hill obligated himself to give me eighteen hundred dollars at a certain time. If he did not have it belonging to the firm, he was to pay it out of his own funds; or, I would give him same amount." On being asked to explain how Mr. Hill was to be reimbursed after paying the \$1,800, this witness, complainant, answered: "I don't know how it was." We confess ourselves unable to explain the foregoing language, unless it means this: that all the partnership effects, except the lands and slaves described in the receipt or agreement as "not disposed of," were embraced in a settlement or agreement, by which one

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partner was to give the other eighteen hundred dollars for his share. We know not how else to explain the language, that Hill was to pay Causler \$1,800 at a certain time, or Causler would give him same amount. It sounds very like the offer to "give or take," frequently heard between joint owners, in negotiations for a sale by one to the other. True, this witness says: "Hill did not give me the \$1,800 and half interest in lands, mentioned in the bill, for my interest in notes and accounts due the firm." This language, literally interpreted, is consistent with our suggestion above; for on that theory, Hill was giving the \$1,800 alone, for Causler's interest in the notes and accounts; not \$1,800 and half interest in the lands. This witness makes other statements tending to show that the \$1,800 was paid to him by Hill on account, and not in the purchase of Causler's interest in the notes and accounts. The witness, Woodliff, testifies that in 1867 Hill informed him that he, the witness, owed Hill & Co., Hill & Sulser, and O. P. Hill. This, however, may have been only a description of the different forms of indebtedness, and not intended to affirm that Causler still held an interest in the claim. On the unaided testimony in this record, we do not think Hill's estate should be held to account for any assets of the partnership, save the lands and slaves described in the receipt or agreement, and the rents and products thereof. Nor should Causler be held accountable for the \$1,800. This statement, however, is made on what appears in this record. The account books, and the letter from Hill to Causler, spoken of in the note of the evidence before the Register, are, no part of them, copied in this record. They, and possibly other testimony, may show that the \$1,800 were paid to Causler only on an account, and that he, Causler, still was interested in the notes and accounts. If so, our intimations above will go for nothing.

Should it become necessary to go into the general partnership dealings, as was done in the former hearing before the Register, we feel it our duty to point out an error into which the Register fell in his former accounting. It consists in the double use made of the \$1,800 item. That item was treated, and rightly treated, as part of the partnership assets. It was charged, and rightly charged, as received and used by Causler. But then, it was part of the gross sum of \$10,525.71 of assets, with which Hill was charged. This brought it into the account of assets received, as a charge against each of the partners, and consequently overstated the gross assets by eighteen hundred dollars. If Hill received \$10,525.71 of gross assets, he turned over \$1,800 of that sum to Causler, and thus reduced his gross receipts to \$8,725.71, from which

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should be deducted his disbursements. This will show a balance of assets, after deducting disbursements, of \$1,800 less than the sum the Register would report on the other basis.

The witness, Causler, should not have been permitted to testify as to any transaction with, or statement by Hill, defendant's intestate, unless he was first interrogated thereto by the opposite party. And the fact that he was put on the witness stand, and interrogated by the defendant in relation to other matters, does not in the least vary the rule.—Code of 1876, § 3058: *Tisdale v. Maxwell*, 58 Ala. 40. Of course, if he had been first interrogated by opposing counsel as to such transactions with, or statements by Mr. Hill in his lifetime, then cross-examination in his own behalf would have been legitimate, not otherwise.

Inasmuch as all the evidence used in the court below is not found in the present transcript, we are unable to lay down absolute rules for taking the account.

Reversed and remanded.

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Real action in the nature of Ejectment.

1. *Ejectment; what necessary to recovery in.*—Ejectment was originally, at common law, a personal action of trespass, and while retaining that form, would have been properly classified as an action *ex delicto*; but in this State it has always been a mixed action for the recovery of land, and damages for its use and occupation, whether the right is simply possessory, or a right to the freehold itself; and whether the common law action of ejectment or the statutory real action is pursued, the issues are the same, the plaintiff must recover on the strength of his own title, and show that he had at the commencement of the suit a legal title entitling him to immediate possession, and that defendant was then in possession.

2. *Wife; when should be sued alone.*—Ejectment to recover lands in the possession of husband and wife, under a deed creating a statutory separate estate in the wife, must, under the provisions of the Code, (§ 2892) be brought against the wife alone.

3. *Same; test of liability to suit alone.*—The test of the wife's liability to suit alone, is not the validity, but the nature and character of her title; if that devolves on her a statutory estate, as between her and her husband, she must be sued alone, though her title may be invalid or subordinate to the title of the plaintiff, and incapable of protecting the possession against his right of entry.

4. *Verdict; what sufficient.*—A general verdict, finding all the issue in favor of the plaintiff in a statutory real action, where the complaint contains a substantial cause of action, and properly describes the premises sued for, is sufficient, and authorizes judgment, though the verdict does not describe the lands.

5. *Registration; statute of, construed.*—The statute of registration, under

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the operation of which a junior conveyance may take precedence of a senior conveyance of the legal estate, saves the priority of the senior conveyance, if recorded within three months after its date, over a junior conveyance that may be earlier recorded, though the junior grantee may not have had notice of it, and has paid valuable consideration.

APPEAL from Lee Circuit Court.

Tried before Hon. JAMES E. COBB.

This was a real action under the Code, commenced by the appellee, S. L. Mullin, against the appellant, America A. Betz. The complaint contains an accurate description of the lands sued for, and avers that the defendant entered thereupon and unlawfully withholds and detains the same.

Both parties claimed title through one Russell Penn, the appellee, Mullin, by a deed of bargain and sale to him executed on the 10th day of October, 1876, and recorded on the 6th day of November, 1876. There was evidence tending to prove that Mullin paid valuable consideration for the land at the time of the purchase, and that Russell Penn was in possession when he made the deed to him. The defendant claimed title by a deed from said Penn, executed on the 4th day of November, 1876, and recorded on the 6th of the same month. This deed was also a simple deed of bargain and sale. Further evidence in the cause proved, without conflict, that at the time the deed to defendant was executed, she was, and has since been, a married woman, living with her husband, Andrew Betz; that upon the execution of the deed to her, her husband took possession of the lands for her, and has since continually held them. There was evidence tending to show that the defendant paid the purchase-money to said Russell Penn, and received said deed from him while he was in possession of said premises, and that she had no knowledge or notice at the time of paying said money and receiving said deed, that the plaintiff claimed any title to or interest in said lands; but upon said question of notice the evidence was conflicting.

The court charged the jury, amongst other things, "that if the plaintiff's deed was recorded within three months from its execution, and was for valuable consideration paid at the time of purchase, and was properly executed, then defendant could not claim protection as a *bona fide* purchaser without notice of said deed; that the effect of recording the plaintiff's deed within three months, was to charge the defendant with notice of the plaintiff's title, even though said defendant had no actual notice." To this charge the defendant excepted, and asked the court to give the following charge: "That if they believed all the evidence they should

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find for the defendant." This charge the court refused to give, and the defendant excepted.

The judgment entry shows the defendant entered into the consent rule, admitting lease, entry, ouster and possession of the premises sued for, that there was a general verdict for the plaintiff "for the lands sued for," and a judgment for recovery of the lands and costs against the appellant. She moved in the court below to set aside and vacate the judgment—1st. Because the judgment is not supported by verdict of the jury. 2d. Because the verdict of the jury in favor of the plaintiff does not specify whether it is for the whole or a part only of the premises sued for. 3d. Because the verdict of the jury is insufficient to authorize a judgment for the premises described in the complaint. This motion the court overruled, and the defendant excepted.

The various rulings to which exceptions were reserved, are now assigned as error.

JOHN M. CHILTON, for appellant.—At common law, the wife was not suable alone, and the statute (Code 1876, § 2892,) makes no change in the common law in respect to actions of this kind. The point is not waived by the pleadings. The fact of coverture did not appear upon the face of the complaint, and no objection could, therefore, be made to the complaint. This being the case, the defendant was compelled to take issue, and prove her coverture under the general issue. She could not have pleaded in abatement; such a plea is never allowed in an action of ejectment.—Tyler on Ejectment, 405; 6 Maul & Selyn, 203. Such defense could be made under the general issue.—2 Bush. Dig. p. 101, § 412. The charge of the court was erroneous. The plaintiff not only fails to record his deed for more than thirty days, but leaves the grantor in possession, and thus in a condition to impose upon others. While the grantor is left in possession, can it be said that if the plaintiff's deed was recorded within three months, that it charged the defendant with notice, even though she had no actual notice?

H. C. LINDSEY, *contra*.—The action was properly brought against appellant, because it pertains to what she contended was her statutory separate estate. In such case, the wife must sue and be sued *alone*. It is the nature and not the validity of the wife's claim, respecting her separate property, which is the test of her liability and her husband's exemption from suit.—1 Lansing (N. Y.) 295. But in any event, the appellant waived any defense on this point by pleading "not guilty." At common law, in an action *ex delicto*, a mar-

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ried woman was required to plead coverture in abatement. 1 Chitty Pl. 92. A plea in abatement is allowable in this action.—6 Ala. 415. The charge given by the court was free from error. The verdict of the jury is sufficient to support the judgment, if the complaint was sufficient.—1 Brick. Dig. 637, § 189, and in this case the complaint is full and sufficient.

BRICKELL, C. J.—An action of ejectment was originally at common law, a personal action of trespass, and while retaining that form, would have been properly classified as an action *ex delicto*. In this State, it has always been a mixed action for the recovery of land, and damages for its use and occupation, whether the right is simply possessory or a right to the freehold itself. The Code of 1852 abolished all common law forms of action, and substituted for them the simple forms it provided. A real action, *in the nature of an action of ejectment*, to recover the possession of land, in which damages for the possession or use and occupation were to be computed to the time of the verdict, was substituted for all common law real actions, whether *droitural* or possessory.—*Ivey v. Blum*, 53 Ala. 172. In 1863, the common law action of ejectment was revived, and parties were given the election to pursue it or the statutory action. Whether the common law action of ejectment or the statutory real action is pursued, the issues are the same, and the plaintiff must recover on the strength of his own title, and is bound to show that at the commencement of the action, he had a legal title, entitling him to immediate possession, and that the defendant was then in possession.

2. The statute declares husband and wife must be joined, either as plaintiffs or defendants, when the wife has an interest in the subject matter of the suit, *unless the suit relate to her separate estate, when she must sue or be sued alone*.—Code of 1876, § 2892. The latter clause of the statute is in abrogation of the rule of the common law, that a *feme covert* could not be sued alone. The appellant and her husband were in possession of the lands in controversy, when the present, a statutory real action, was commenced. The title, or estate, under which the possession was taken and held, resided in the wife, and was her statutory separate estate. The possession must be referred to the title, and she was therefore suable alone. The title may be invalid; it may be subordinate to the title of the appellee, and may be incapable of protecting the possession against his right of entry. The test of her liability to suit alone, is not the validity but the nature and character of her title. If that devolves on her

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a statutory separate estate, as between her and her husband, the statute is imperative that she must be sued alone, having full opportunity to defend it, and in a relation to be concluded by the judgment which may be rendered. How far the husband may now be liable for the torts of the wife, or the mode of taking advantage of the nonjoinder of the husband, if the wife is sued alone in an action *ex delicto*, are not questions now involved. The suit *relates to the separate estate of the wife*, and she was, under the statute, suable alone.

3. The complaint contains a sufficient cause of action, describes the lands accurately, averring that the defendant entered thereupon and unlawfully withheld and detained the same. The verdict is general, finding the issues for the plaintiff. The verdict must be referred to the issues, and when so referred, it is certain, and would not have been more so if it had mentioned the lands.—*Hamner v. Eddins*, 3 Stew. 192.

4. It is only by operation of the statute of registration, that a junior conveyance can have priority over a senior conveyance of the legal estate. If the senior conveyance is recorded within three months after its date, the statute preserves its priority over a junior conveyance that may be earlier recorded, though the junior grantee may not have notice of it, and it is supported by a valuable consideration.

The rulings of the Circuit Court, to which exceptions were taken, conformed to these views, and the judgment must be affirmed.

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Action on the case.

1. *Action; who may maintain.*—A party in possession of lands, whatever may be his title, or though he be without title, can maintain an action for an injury to his possession against a wrong-doer.

2. *Evidence; what admissible.*—It is permissible for a witness to testify as a fact that he is in possession of land, and he may also testify that he derived his possession from one formerly in possession claiming title to lands. Such continuous possession under claim of title, creates a presumption of ownership, which will support ejectment, until a better title is shown.

3. *Same.*—When a question is asked a witness which is not objectionable in form, but only because it may elicit illegal evidence, the injury is not in allowing the question to be asked; and if illegal evidence is contained in the reply, the objection should be made to the reply and the exception directed against the admission of the answer.

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4. *Limitations, statute of; what governs actions on case for injuries caused by erection of dam.*—The statute of limitations of one year, (Code of 1876, § 3231) governs actions on the case for damage to riparian lands, caused by the diversion of the waters of a stream by the erection of dam across such stream.

5. *Charge; what improper.*—It is not necessary that a plaintiff should show actual damage in order to maintain an action for an injury to his lands by the erection of dam, causing a stream to overflow them; and a charge which forbids a recovery, unless actual damage be shown, within the time which constitutes a bar to the action, is erroneous and properly refused.

6. *Charges; when may be refused.*—When a party requests charges which, though separately numbered, were not separately asked, and any of the charges thus asked are erroneous, the court is not required to distinguish between the good and the bad, but may refuse them all.

APPEAL from Lee Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an action on the case brought by the appellee, D. N. Gibson, against the appellant, The Eagle & Phoenix Manufacturing Company, to recover damages for injury done to lands of the plaintiff, by the diversion of the waters of the Chattahoochee river from its natural course, caused by the erection of a dam across said river by the defendant. On the trial, plaintiff was introduced as a witness, and on his direct examination the following question was asked him: "Who is in possession of these lots said to be damaged, and in what manner?" The witness answered that he was in possession of the lots and claimed title to the same. The defendant separately objected to both the question and answer. The court overruled the objections and defendant excepted. The plaintiff was asked "from whom he received the possession of the lots." Defendant objected to the question. His objections were overruled and he excepted. Plaintiff then answered that he obtained possession from one Edmunds, who was in possession, and claimed these lots as owner at the time he delivered them to witness. The defendant objected to this answer; his objection was overruled and he excepted. The following question was then asked the witness: "How are you in possession—whether as owner or otherwise, and state what acts of ownership, if any, you have exercised?" Defendant objected to this question; the court overruled his objection, and he excepted. In answer, witness stated "that he was in possession of them as his own, and stated various acts of ownership." This answer was also objected to by the defendant; his objections were overruled, and he excepted. The plaintiff "was then asked what was the value of the property at the time of the commencement of this suit in its then condition?" This question was also objected to by the defendant, and an exception reserved to its allowance. This witness further testified, that he bought and owned a part of the property,

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alleged to have been washed out in the year 1861, and had been in possession ever since.

One J. T. Holland, a witness for plaintiff, having described the dam, and having mentioned a rock wall running north and south on the eastern bank of the river, and connected with and joining the dam, was asked by the plaintiff to describe it. This question was objected to by the defendant; the objection overruled, and the defendant excepted. Testimony was introduced tending to show that the rock wall running north and south on the eastern bank of the river, and connecting with the eastern end of the dam, diverted the water current and drove it back on the Alabama bank. The defendant objected to this evidence. The court overruled the objection, referring it to the jury to ascertain and determine from the evidence, whether the rock wall was, or not, a part of the dam, but holding that if the wall was not a part of the dam, the plaintiff could not recover in this suit for any injury done by the said wall; and to this ruling of the court the defendant excepted.

One Bates, a witness for defendant, was asked by the plaintiff, on his cross-examination, the following question: "If he did not think that persons equally as honorable and intelligent as himself, and who were living there, would not know more about the wash than he did?" The defendant objected to this question. His objection was overruled, and he excepted.

There was testimony tending to show that since a dam was erected (being about the year 1853 or 1854) by a company formerly in existence, and known as the Eagle Company, the current of the stream had always had the same course as it had since the present dam was erected; that the stream since that time had gradually and regularly washed the western bank near the points where the property alleged to be damaged, was situated. Further testimony tended to show that the washing complained of, was done by the river at high water, or at times when there were freshets. It was in evidence that the dam alleged to have caused the injuries complained of in this action, was built by the defendant not earlier than the year 1866.

There was evidence tending to show that the defendant corporation had real estate and other property in Lee county, in this State, to the value of twenty-five thousand dollars. It was also shown that the land alleged to have been damaged was in Russell county, Alabama. It was admitted that the defendant was a Georgia corporation, and had no agent or office in this State. It was proved that the plaintiff's house and a portion of his lots were washed away

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by the spring freshets in the year 1874, and before the commencement of this suit.

The defendants then requested the court to charge the jury as follows: 1. That before the plaintiff can recover, the jury must believe from the evidence that the plaintiff suffered damage, during the one year prior to the commencement of this suit, and the plaintiff must show how much damage was done in that one year, or show by such evidence such a state of facts as will enable the jury to estimate the amount of damage. 2. That before the plaintiff can recover, the jury must believe from the evidence that the plaintiff suffered damage within one year prior to the commencement of this suit, and the plaintiff must show how much damage was done in that one year, and if the proof shows that damage was committed during that one year, and the years previous to that time, and does not show how much was done during that one year, but leaves the proof so in doubt that the jury cannot tell how much damage was done during said one year, and how much before that time, then the jury must find for the defendant. The defendant requested nine other charges, which were numbered consecutively from three to eleven, which, in the view the court took of the case, need not be further noticed. The bill of exceptions recites that "the court refused to give the above charges, from one to eleven inclusive, to the jury, although requested so to do by defendant's counsel in writing, whereupon the defendant excepted severally to said refusal of the court." There was a verdict and judgment for the plaintiff for the sum of sixteen hundred and twenty-five dollars, and the defendant appeals to this court, assigning as error the various rulings to which exceptions were reserved.

SAMFORD & LINDSEY, for appellants.

W. H. BARNES, and GEORGE W. HOOPER, *contra*.

BRICKELL, C. J.—The action is case to recover of the defendant damages for diverting from their natural channel the waters of the Chattahoochee river, causing them to overflow and injure the lands of the plaintiff. A party in possession, whatever may be his title, or though he be without title, can maintain the action against a mere wrong-doer.—*Crommelin v. Cox*, 30 Ala. 318. Possession, the actual occupancy of lands, is a fact, (and not as counsel for the appellants argue, a conclusion of law, or of fact,) to which a witness may testify. Nor was there any reason for excluding the testimony of the plaintiff, showing that he

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derived his possession from a former occupant who claimed title. Continuous possession of land, under a claim of title, creates a presumption of ownership, which will support ejectment, until a better title is shown.—*Badger v. Lyon*, 7 Ala. 564.

When a question is propounded to a witness, which is not objectionable in form, but objectionable only because it may elicit illegal evidence, the injury is not in the question, or in allowing it to be put to the witness. The witness may disclaim all knowledge of the matter to which the question refers, or if not disclaiming, the answer may disclose evidence favorable to the party against whom he is being examined, and prejudicial to the party propounding the question. If the answer introduces illegal evidence, injurious to the party objecting, he can show the injury by making the answer a part of his bill of exceptions. But if he neglects this, there is no error an appellate court can revise. The answer, if any was given, may have been beneficial to him, or none may have been made.—*Burns v. The State*, 49 Ala. 379; *Hirschfelder v. Mitchell*, 54 Ala. 415; *Nailor v. Williams*, 8 Wall. 107. This disposes of the second, third, fourth, and fifth assignments of error, directed against questions propounded to witnesses, which are not shown to have been answered.

The averments of the complaint are, that the dam across the river caused the overflow of the water. The evidence tended to show, that not only the dam, but a rock wall on the eastern bank, caused the overflow. If the wall was a part of the dam, there was no variance between the allegation and the evidence. It was a question of fact, for the jury to determine, whether it was a part of the dam; and the question seems to have been properly submitted to them.

The statute of limitations governing this action is § 3231, Code of 1876, which prescribes one year as the period within which certain actions therein named must be commenced.—*Rountree v. Branley*, 34 Ala. 544; *Polly v. McCall*, 37 Ala. 20. Actual damage is not essential to support the action, "and two reasons are given for the doctrine—that wherever there is a wrong, there must be a remedy, and the plaintiff must at least be entitled to nominal damages; and that otherwise the adverse enjoyment might ripen into a title by lapse of time before there was any actual damage."—*Rountree v. Brantley*, *supra*, and authorities cited. The first and second charges, if given, would have excluded the plaintiff from recovering nominal damages, though he may not have shown actual damage within one year before the commencement of suit, and though the wrongful act was

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done, or the consequence of the act, the overflowing his lands, did not occur until within that period. A party requesting charges to the jury must frame them so that they will not mislead, and must be careful that the proposition, or principle of law, is precisely expressed. The court is not bound to modify or reform them, and indeed the statute prohibits it from so doing.—Code of 1876, § 3109. The charges requested by the appellant, though separately numbered, were not separately requested. The court was requested and refused to give them all. As two of them were manifestly erroneous, it was not the duty of the court to distinguish between them and the others—giving a part and refusing a part. It was bound to refuse them as they were requested. We repeat that which has been so often said in this court, that a party cannot devolve on the primary court the duty of distinguishing legal and proper, from illegal and objectionable instructions by mingling them. The court may decline the duty, and refuse instructions so mingled.

Let the judgment be affirmed.

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Bill in Equity for Settlement of Guardianship.

1. *Appeal; when does not lie.*—When more than two years elapse after the rendition of a decree settling the equities of the parties, appeal subsequently taken will not bring up for revision matter passed on in such decree, but only such proceedings as are had in the cause, after such decree.

2. *Errors; what cannot be corrected in appellate court.*—Errors, in taking an account, or confirming a report, cannot be corrected here, unless first brought to the notice of the Chancellor by objection or exception; and where exceptions well taken to an account and report are withdrawn, it is an admission of their correctness, and precludes the raising of that question on appeal.

APPEAL from Jefferson Chancery Court.

Heard before Hon. CHARLES TURNER.

The opinion states the facts.

HEWITT & WALKER, for appellant.

WATTS & SONS, *contra*.—1. The only error which can be noticed by this court, is the one as to the decree rendered on the 17th November, 1874. The decree of the 20th May, 1874, is barred by the statute, more than two years having elapsed before the appeal was taken. The decree of 20th

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May settled all the equities of the case, and an appeal could have been taken from it at any time within two years after its rendition, but never was taken.

2. The decree rendered 17th November, 1874, is merely a confirmation of the report of the Register, and a recovery consequent thereon.

The exceptions to the report were withdrawn in open court; and thus nothing was left for the Chancellor to do, except to render the decree.

MANNING, J.—The appeal in this case is specially from the decree rendered on the 17th of November, 1874, and was taken on the 16th day of November, 1876, just before the two years within which an appeal is allowed, had expired. The decree was one which confirmed the report of the Register stating an account, after appellant's exceptions thereto were withdrawn, and ordered the amount ascertained thereby to be due, to be paid by appellant to his late ward, appellee.

The equities between the parties were settled by the prior decree of May 20th, 1874, more than two years before the appeal was sued out, and this was the final decree from which the appeal should have been taken, if any thing then or previously decided, was intended to be brought before this court for its review and judgment.—*Bank of Mobile v. Hall*, 6 Ala. 141; *Jones v. Wilson*, 54 Ala. 50. Any error, therefore, which this court could now correct must be shown to have been committed since the decree of May 20, 1874.

This could have happened only in the taking and stating of the account ordered by that decree, or in the confirmation of it; and such an error, if there was any, could not be presented here, without having first been brought by exceptions to the Chancellor's notice, and his ruling obtained thereupon. By the withdrawal of the exceptions that were filed by appellant to the account and report of the Register, as master, their correctness was admitted. It follows that the decree appealed from must be affirmed.

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*Ex parte Nelson & Kelly.**Mandamus.*

1. *Bill of exception ; when and where may be signed.*—Under the practice in this State, with the sanction of this court, prior to the act of 1844, it was common to sign and seal bills of exceptions, when exception was duly taken on the trial, either during or after the term, and often in another county than that in which the court was held. The statute of 1844, and subsequent amendments (Code, § 3133), changed this practice in one respect only—as to the time in which bills may be signed.

2. *Same ; who must sign.*—The judge who presides on the trial is alone authorized to sign and seal a bill of exceptions in the cause ; and where the judge of one circuit opens court in another circuit and tries causes during part of the term, he may, after ceasing to hold the court, sign and seal bills of exceptions in such causes, in a county and circuit other than that in which the court was held, if he does so during the term, though the judge of the circuit is then presiding in that court and continues to do so for the remainder of the term.

This was a motion for a *mandamus*, or other remedial writ, to compel the Hon. John Henderson, Judge of the 10th Judicial District, to strike from the files of the Circuit Court of Talladega county, a certain bill of exceptions filed in said court, in the case of E. B. Nelson and S. C. Kelly against A. J. Street, which said bill was signed by William L. Whitlock as the judge presiding at the trial of the case, which occurred at the Spring term, 1879, of the Circuit Court of Talladega. The following are the facts in relation to the signing of said bill of exceptions. Judge Whitlock opened court on the 21st day of April, 1879, and held said court continuously until the 25th day of that month, and that on Saturday, the 26th day of April, Hon. John Henderson presided and held said court until the close of the term. While Judge Whitlock was presiding in the said circuit, he tried the case of Nelson and Kelly against A. J. Street and rendered a judgment for \$3,219.00 in their favor on the verdict of the jury, and overruled a motion by Street for a new trial. On the 17th day of May, 1879, and before the adjournment of the term of the court at which the cause was tried, Judge Whitlock, at Gadsden, in Etowah county, Alabama, which county is in the 12th Judicial Circuit, signed a bill of exceptions and delivered the same to F. W. Bowdon, one of the counsel for Street, who delivered it to the clerk of the Circuit Court of Talladega county to be filed among the papers in the

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cause, on the 19th day of May, 1879, and it was marked filed by the clerk on that day.

The petitioners moved the court below, Hon. John Henderson presiding, to strike the bill from the files, on the ground that it was signed by Wm. L. Whitlock, in Gadsden, in Etowah county, Ala., and that he had no power, jurisdiction, or authority to sign the same, while in Gadsden, without the written consent of plaintiffs or the attorneys of record, which was shown not to have been given. The court below refused the motion, and application is here made to compel the court to grant it, and strike said bill of exceptions from the files.

J. T. HEFLIN and L. E. PARSONS, for the motion.—A bill of exceptions must be tendered by the party supposing himself aggrieved, stating the point, charge, opinion or decision, with such a statement of the facts as is necessary to make it intelligible, and if correctly stated, it is the duty of the *presiding judge* to sign the same, which thereby becomes a part of the record.—Code of 1876, § 3108. Without the signature of the presiding judge the bill does not become a part of the record, even though it is correctly stated and counsel consent that it may be treated and regarded as a bill in the Supreme Court.—54 Ala. 178; 17 Ala. 700; 52 Ala. 7; *Ib.* 112; 28 Ala. 158; 34 Ala. 149. It is the signature of the *presiding judge*, not of the judge who *presided*, that makes the bill of exceptions a part of the record. It is the act of the court, not of the judge as distinguished from the court. Judge Whitlock, as judge of the 12th Judicial Circuit, has no power or authority over the records of the Circuit Court of Talladega. While he held court his power and authority as presiding judge enabled him to make and unmake the records of that court as to him seemed right.—7 Ala. 201. But that power and authority ceased when he absented himself, and Judge Henderson became the presiding judge of that court, and acted as such until the close of its session.—54 Ala. 61; 5 Ala. 9; 6 Ala. 881.

BOWDON & KNOX, *contra*.—*Mandamus* will not lie to revise the action of a lower court, though it will to compel it to take action. When the judge has acted it can not be revised by such a writ.—See 56 Ala. 596; 49 Ala. 360; 39 Ala. 698; 26 Ala. 133. A motion to strike from the files a bill of exceptions must be based on irregularities apparent on the face of the record. What is stated in the record must be taken as true, until the defect is remedied by amendment. In the present case it is not pretended that there is any

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defect apparent in the record, and no evidence *de hors* the records can be received to show an irregularity.—50 Ala. 23; 17 Ala. 143; 24 Ala. 329; 29 Ala. 82. There is no statute which designates when the presiding judge shall sign a bill of exceptions. It is a full compliance with the statute, if it be signed within the time prescribed. The term, presiding judge, means the judge who presides on the trial of the case, and not the judge who happens to preside over the court at any different time. How could a judge who had not tried a case, sign a bill of exceptions, even if he did happen to be the presiding judge at some other time during the term of the court at which the trial was had? If the bill is signed by the judge who presided at the trial, while the term of the court at which the trial was had is still in session, the statute has been fully complied with and the bill becomes a part of the record of the cause.—9 Port. 441; 6 Ala. 881; 5 Ala. 237; 13 S. & R. 85; 54 Ala. 178.

STONE, J.—“Either of the parties in any civil case, during the trial of the cause, may reserve, by bill of exceptions, any charge, opinion, or decision of the court, touching the cause of action, and which would not otherwise appear of record.”—Code of 1876, § 3107. “No bill of exceptions can be signed after the adjournment of the court during which the exception was taken, unless by consent or agreement of counsel in writing, except in such cases as is otherwise provided.”—*Ib.* § 3113. Bills of exceptions were unknown to the common law of England. They had their origin in Statute Westm. 2—13 Edw. 1, ch. 31. “The bill of exceptions, (under their practice,) must be tendered at the trial; for if the party then acquiesce, he waives it, and shall not resort back to his exception, after a verdict against him; when, perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point. The statute, indeed, appoints no time; but the nature and reason of the thing require that the exception should be reduced to writing, when taken and disallowed, like a special verdict, or demurrer to evidence; not that it need be drawn up in form, but the substance must be reduced to writing while the thing is transacting, because it is to become a record. * * * When the bill of exceptions is sealed, the truth of the facts contained in it can not afterwards be disputed.”—Tidd’s Pr. 863-4; 2 Bouv. Bacon’s Abv. 112. In the early days of our judicial history, a practice grew up of noting or remembering the exception when taken, and of writing it out, giving it form and body, and having it sealed by the presiding judge, afterwards; sometimes days,

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weeks, or months afterwards. Often this was done at another court, or in another county. Objection was raised to this practice in the case of *Strader, Perrin & Co. v. Alexander*, 9 Por. 441, but it was overruled. This court said, "If the exception be taken at the trial, it may be noted by the judge, and the bill sealed at any time, either during the term or afterwards." In the case of *Pool v. Cahaba & Marion Railroad Company*, 5 Ala. 237, the bill of exceptions was sealed six months after the adjournment of the court at which the trial was had. In the opinion of this court, after copying what we have copied above, it is added that, "The object of taking a note, is merely that a recollection of the point may be retained, and not indispensable to the legality of the bill. If, therefore, the judge remembers it with sufficient distinctness to enable him to certify it as it arose at the trial, he can perfect the bill of exceptions after court." The case of *Weir v. Hoss*, 6 Ala. 881, was a very strong one. The bill of exceptions was sealed twelve months after the trial, and long after the appeal had been taken to this court. A motion was made in this court to suppress the bill of exceptions. The motion was overruled. Soon after this case was decided, and probably influenced by it, the act of December 20, 1844, was passed, by which judges were prohibited from giving or signing bills of exceptions after the adjournment of the term at which the exception was taken, with a *proviso* that, "by the consent of counsel, reduced to writing, a longer time may be allowed, not to extend beyond ten days from the adjournment of said court."—Pamph. Acts, 5; Code of 1852, § 2358; Revised Code, § 2760. We know judicially that at the end of ten days after the adjournment of most of the circuit courts, the presiding judge will be holding court in another county. We know, too, that in practice, under the written consent of counsel, given under the act of 1844, bills of exceptions were frequently signed in a county other than that in which the trial was had. Yet, we are not aware that any motion has ever before been made to suppress a bill of exceptions, because it was granted and signed out of the county in which the trial took place. Under the act of 1844, it was uniformly ruled in this court, that unless the record affirmed the signing of the bill of exceptions within the time prescribed by that statute, it would not be regarded as a part of the record.—1 Brick. Dig. 245, §§ 43, 44, 45, 46, 47, 50. Thus the law stood until February 14, 1870, when it was so changed as to read as now found in section 3113 of the Code of 1876, copied above.

Bills of exceptions, when signed by the presiding judge within the time prescribed by law, become a part of the

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record of this court when the case is brought here by appeal. Like all other records, they import absolute verity, and can not be altered after their execution, by the judge who presided on the trial, or by proof in this court showing errors committed therein. The case of *Weir v. Hoss* was a severe application of this principle. In the opinion of the court it is said, "A number of affidavits, and a letter from the presiding judge to one of the counsel, have been produced, and a motion made to suppress the bill of exceptions. The affidavits certainly tend to establish, that the bill of exceptions does not correctly state the points reserved on the trial, or, at least, to render it a matter of doubt, which is strengthened by the letter of the judge, admitting that he did not remember the facts very distinctly, and that he relied upon the statements of the defendant's counsel; but we are clear in the opinion that this is not sufficient to authorize the suppression of the bill of exceptions. We can not try the facts, and determine what was reserved at the trial. That can only be ascertained by the court before which the point was reserved. In this case the judge has certified the bill of exceptions; it is a part of the record, and can no more be impugned by extrinsic proof than any other part of the record." The same principle had been declared in *Br. Bank v. Kinsey*, 5 Ala. 9, and was solemnly reaffirmed in *Chapman v. Holding*, 54 Ala. 61. See, also, *Hollingsworth v. Chapman*, 50 Ala. 23.

Under our system it frequently happens, and without fault or cause of complaint, that one circuit judge holds a part of a term, and another completes it. And under our Constitution, as now framed, Art. 6, § 18, some person other than the judge, "practicing in the court, and learned in the law," may be agreed on or appointed to preside in the trial of a cause in which the presiding judge is incompetent to sit. In such case, the commissioned judge holding the court, temporarily vacates the seat, while the special judge hears, decides and renders judgment in the particular cause. That case disposed of, the special judge leaves the bench and the presiding judge proper resumes the seat, and continues with the business of the court. It might happen, and no doubt does, that in courts having heavy dockets, more than one, nay, several special judges, will be agreed on by the several litigants, to hear and decide the different causes in which the judge, by reason of relationship, interest, or prior connection as counsel, is incompetent to preside. In such cases it would work injurious delay, if not an intolerable grievance, if each successive judge were required to remain the occupant of the bench, and thus suspend all other business until

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exceptions reserved could be reduced to writing as a formal bill of exceptions, disputed questions settled, and the bill signed, every time the incumbency of the bench might undergo a change. In the case of *Gordon v. Ryan*, 1 J. J. Marshall, 55, a motion was made to suppress the bill of exceptions, because it was not signed until twelve months after the trial. The Supreme Court of Kentucky said: "It is urged in this case that the bill of exceptions containing the evidence should be altogether disregarded, because it was not signed, sealed and made part of the record at the term the judgment was rendered. After the jury found their verdict, the court took until the next term to consider of the judgment; and at the term judgment was rendered, the court gave the defendant leave until the next term thereafter to file exceptions. It is argued that exceptions so filed are void, and should not be regarded. This we do not concede. It is the duty of the court below to allow the party exceptions as matter of right; and if time should be given, from term to term, to prepare them, and that be erroneous, it would be making the errors of the court close the door against all redress to the injured party. It may often happen, and sometimes does, that important causes are not decided until the last hour of the term, by the jury. In such cases, from necessity, the court must often take time to consider until the next term, and also give time to prepare exceptions. These things must be left to the sound discretion of the inferior courts. The points put down in the exceptions must be made and reserved in the progress of the cause, and if not, the party may waive the objection; but when the points are so made and reserved, they may be reduced to writing and placed in the record thereafter, at the discretion of the court." In the case of *Stewart v. Huntingdon Bank*, 11 Serg. & Rawls, 267, in the opinion by Tilghman, C. J., is the following language: "The court was requested by the counsel for the defendants, to suspend the trial until the bills of exceptions were drawn up in form and sealed by one of the judges. This the court refused, on account of the delay it would occasion, but a note of the exception was taken, to be afterwards reduced to form. I do not know that the conduct of the court, in a case of the kind, is the subject of a bill of exceptions. There can be no impropriety, however, as the case is before us, in giving our sentiments on it. The counsel who takes an exception, has a right to have it fixed immediately. A note in writing is sufficient; and such a note should never be omitted. We have frequently experienced great inconvenience from the want of it. In the present instance, however, the court did immediately reduce the

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substance of the exception to writing, so that there was no cause for complaint." In the case of *Sikes v. Ransom*, 6 J. R. 281, there is a collection of English authorities on this question. In the opinion, probably by Kent, then Ch. J., and afterwards Chancellor, is the following language: "Regularly, a bill of exceptions ought to be tendered at the trial, though the practice is to allow the counsel to tender it afterwards." The following cases shed light on this question, and may be consulted with profit. It will be seen that the rule is not the same in the different States, influenced, no doubt, by their varying statutes: *Ex parte Martha Bradstreet*, 4 Pet. 102; *Walton v. U. States*, 9 Wheat. 641-657; *Morris v. Buckley*, 8 Serg. & Rawls, 211; *Coburn v. Murray*, 2 Greenl. 336; *Law v. Merrills*, 6 Wend. 268; *Churson v. Kruper*, Breese, 162; *Shipard v. White*, 3 Cow. 32; *Midberry v. Collins*, 9 J. R. 345; *Clark v. Dutcher*, 19 J. R. 246; *People ex rel. v. Herkimer Co.*, 7 Wend. 536; *State v. Lard*, 5 N. H. 335; *Bratton v. Mitchell*, 5 Watts, 69; *U. S. v. Gibert*, 2 Summ. 19; *Pool v. Lessees of Fluger*, 11 Pet. 185; *Seale v. Chambliss*, 35 Ala. 19.

We think we may safely affirm that prior to the statute of 1844, a practice had grown up in this State of granting and executing bills of exceptions, either during the term, or after the adjournment of the court at which the cause was tried, and either in the county in which the trial was held or out of it. And bills of exceptions so signed and sealed were never rejected or suppressed on that account. We think, too, that this practice, although liable to abuse in negligent or dilatory administrations, is sanctioned alike by authority and reason. The jurisdiction of the circuit judges is co-extensive with the State. They have the same official authority and power in one county as in another. Signing a bill of exceptions does not require the machinery of a court. It is the act of the judge, and it would seem that his sense of duty and his official restraints, ought to be and are as binding in one part of the State as in another. The act of 1844, followed up by the sections of the different Codes, referred to above, has wrought one, and only one, change in this practice; that of *the time* within which the bill may be signed. So far as we are informed, this was the only abuse the legislature proposed to remedy. They said nothing about place. Only the judge who presided at the trial could know what exceptions were reserved, and he alone could certify them. Another judge, although presiding during a part of the same term, could have no knowledge, and therefore could have no jurisdiction in the premises. "No bill of exceptions can be signed after the adjournment of the court during

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which the exception was taken," &c. This bill was signed before the term of the court adjourned—was signed by the judge who presided on the trial, and therefore it was signed within time.—*Seale v. Chambliss*, 35 Ala. 19.

Writ of *mandamus* denied.

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Indictment for selling Liquor to Minor.

1. *Indictment; what sufficient.*—An indictment for the offense of selling liquor to a minor, which follows the form laid down in the Code, is sufficient.

2. *Same; what not ground for quashing, or striking from the files.*—When a bill of indictment is returned into court by the foreman, in the presence of at least twelve of the grand jury, it is not permissible, in support of a motion to quash or strike from the files, to show by the parol testimony of some of the grand jurors that twelve of the grand jury did not concur in the finding.

3. *Grand juror; age of, who cannot complain of.*—The fact that one of the grand jury finding the indictment was over sixty years of age, furnishes no ground for quashing or abating the indictment. The exemption of persons over sixty years of age is a personal privilege which they may waive.

4. *Challenge; when right to not waived.*—The right of challenge is not lost until the juror is sworn or accepted for the trial of the issue; and when the juror is one of the regular panel for the week, the defendant does not lose his right to challenge until he accepts the juror for his trial.

5. *Challenge; rule of procedure as to.*—In all criminal prosecutions the State must be required to pass upon the jurors offered, before the defendant can be compelled to announce his acceptance or rejection of them.

APPEAL from Coosa Circuit Court.

Tried before Hon. WILLIAM L. WHITLOCK.

The appellant, William H. Spigener, was tried and convicted on an indictment which charged that he "did sell or give spirituous, vinous or malt liquors to William Pond, a minor, against the peace and dignity of the State of Alabama."

When the case was called for trial, and before pleading to the indictment, defendant moved to quash the indictment or strike it from the files, "because the same was not voted or preferred as a true bill by the grand jury of Coosa county at the fall term, 1878, when it purports to have been found." In support of this motion, the defendant offered to prove by the records of the court that the grand jury at that term of the court, consisted of only seventeen persons, and who those persons were, and then to prove by nine of the persons who composed the grand jury that they had each one refused to vote for or prefer a true bill against the defendant for the

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offense charged in the indictment, but that on the contrary, they had voted "no true bill," when this charge was before that body. The court refused to hear this evidence in support of the motion to quash, and the defendant excepted. The defendant then moved to quash the indictment or strike it from the files, on the ground that A. J. Salter, one of the grand jurors who found the indictment, was, at the time of the finding of the same, over sixty years of age, and offered to prove his age in support of the motion. The court refused to hear this evidence or to grant the motion to quash, and the defendant excepted.

The State, upon the calling of one of the regular juries for the week, announced itself satisfied, and defendant peremptorily challenged two of the panel. Two others from the other regular jury were called, and the court asked defendant what he had to say as to the two called to take the place of the challenged jurors; the defendant objected to passing on them until the State had announced satisfied. The court overruled defendant's objections, and he excepted. The defendant then challenged both of the proposed jurors peremptorily, and two more were called from the regular panel, and the defendant was required to pass upon them, before the State announced itself satisfied. The defendant declined to do this, and the State accepting the jurors, he then challenged them peremptorily. The court refused to allow the challenge, and the defendant excepted. The defendant then pleaded in abatement that one of the grand jurors who found the indictment was over sixty years of age at the time he acted as grand juror. The State demurred to this plea, and the court sustained the demurrer, to which action the defendant excepted. The defendant was then put on trial before the jury as above constituted, and objected to going to trial before the jury as thus constituted. His objections were overruled, and he excepted. He then pleaded not guilty, and the State introduced evidence which showed that the defendant had, within the period of twelve months before the finding of the indictment, and in Coosa county, sold liquor to W. E. Pond, who was a minor. The evidence also showed that Pond had the appearance of being twenty-two or twenty-three years of age, and that the father of said Pond had told defendant that he might sell his son whisky. This was all the evidence, and the defendant asked the court to give the following written charges: 1. "If the jury believe the evidence, they will find the defendant not guilty." 2. "That unless the jury believe from the evidence that Wm. E. Pond was a minor when the defendant sold him the whisky, and the defendant knew it, or had good reason to

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believe he (William E. Pond) was a minor at that time, that then they must find the defendant not guilty." The court refused each of said charges, and the defendant duly excepted. There was a verdict of guilty, and the defendant appeals to this court.

L. E. PARSONS, Jr., and S. J. DARBY, for appellant.—The indictment is insufficient. The statute, § 4205 of the Code of 1876, contains this exception: "Except upon the requisition of physician for medicinal purposes." The act from which this section is taken contains the exception in the enacting clause. The case of *Davis v. The State*, 39 Ala. 521, is directly in point, and is conclusive against this indictment. Where an offense unknown to the common law is created by statute, which describes the constituents necessary to make the offense, an indictment under it must conform to the description given.—See 17 Ala. 181; 19 Ala. 586; 21 Ala. 218.

Section 4777 of Code of 1876, enacts: "The concurrence of at least twelve grand jurors is necessary to find an indictment, and when so found, it must be endorsed a true bill, and the indorsement signed by the foreman." The proof offered shows that the bill of indictment in this case, was not found in the manner provided by statute, and to refuse to hear proof is to render the statute nugatory. If the facts be, as the proof offered shows them to have been, there was no valid indictment, and the motion to quash or strike from the files should have been granted. The challenge of the two jurors should have been allowed; the right was not lost until the juror was sworn in the particular case to be tried, if it is a special jury for that case.—51 Ala. 30. The case of *Smith v. The State*, 55 Ala. 1, shows that the right to challenge for cause is not lost until the juror has been accepted for the trial of the cause, if he be one of the regular panel for the week; certainly the right to challenge peremptorily is of equal dignity as a challenge for cause. The grand juror who was over sixty years of age, was incompetent, and a grand jury constituted with him as a member, was illegal, and its presentments without force; especially when, as in this case, the attention of the court is called to the unfitness of the juror and such disqualification shown to exist.

H. C. TOMPKINS, Attorney-General, *contra*.—The grand juror, Salter, was not incompetent. His age was a good cause of excuse, which was personal to himself.

There is no statute or rule of law which prescribes the order in which challenges should be allowed, and hence it must rest in the discretion of the court. The right the law gives

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the defendant is to challenge so many jurors peremptorily. The court, in this case, did not take away that right, but only undertook to regulate the mode of its exercise.

The indictment follows the form prescribed by the Code, and is, under repeated decisions of this court, sufficient.

When a bill is returned into court, as it was not denied this was, it is returned by the grand jury and not by the foreman alone; the act of returning is not his act, but is the act of the whole jury; they are present; it is their duty to know what bills are presented, and the law must conclusively presume that they did know. The return of the indictments is a solemn declaration, under the solemnity of the oaths they took as grand jurors, that the indictments returned are findings of at least twelve of their number, and no person who was a grand juror should be allowed to impeach the record in such a case.—1 Greenl. Ev. § 253.

STONE, J.—The indictment in the present case is an exact copy of form 59, Code of 1876, p. 998, and is sufficient. Code of 1876, sections 4205, 4824.

The statutes require the grand jurors to take an oath that they will keep secret the State's counsel, their fellows and their own.—Code of 1876, section 4755; see, also, sections 4134–5. Indictments, when found, are presented to the court in open session, by the grand jury as a body. This is a solemn, official affirmation to the court that the bills then presented, indorsed by the foreman true bills, and signed by him, are the findings of at least twelve of the grand jury. The grand jurors being present, if any bill, so presented, was unauthorized by the requisite finding, the fact should then be made known. The indictment being returned and delivered to the court, is then indorsed by the clerk and filed in his office, and becomes a record of the court.—Code of 1876, sections 4677, 4821. Indictments having these solemn sanctions thrown around them, it is not permissible to receive testimony, either of the grand jurors, or of any other person cognizant of the facts, to show how any grand juror, or any number of them, voted on any particular finding. The record can not be disproved in this way.—1 Greenl. Ev. § 252.

Section 4733 of the Code of 1876, directs that in drawing and selecting grand and petit jurors, "no person must be selected who is under twenty-one years of age, or over sixty years of age," &c. One of the grand jurors at the time at which this indictment was found, was over sixty years of age; but he waived his exemption, and consented to serve. This was no ground for quashing or abating the indictment. Code of 1876, section 4889; Clark's Manual, § 2329.

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Under our statutes, in all prosecutions, whether for crimes or misdemeanors, peremptory challenges of jurors are allowed to the State and to the accused; the number allowed to the accused being greater than that allowed to the State.—Code of 1876, sections 4879, 4880, 4877. The statute no where declares which party shall be required to first exercise this privilege. In the Circuit Court, certain jurors were summoned from another jury to supply the deficiency caused by prior challenges; and as to these jurors, so summoned, the defendant was ruled, against his objection and exception, to first announce his acceptance or rejection of such jurors, before the prosecuting attorney should be required to announce whether or not he challenged any of them peremptorily. The defendant thereupon declined to announce whether or not he would challenge such jurors until the State had first spoken. The solicitor then accepted said jurors, whereupon the defendant offered to challenge them peremptorily, which the court refused to allow. The defendant had not exhausted his peremptory challenges. The charge in this case is a misdemeanor; and in trials for such offense, our statutes do not require the regular jurors who have been sworn for the week, to be specially sworn in each particular cause. The general oath, at the commencement of the week, is sufficient in all cases, civil and criminal, except capital felonies.—Code of 1876, § 4765. We have uniformly held that the right to challenge a juror is not waived or lost until the juror is accepted, or is sworn for the trial of the issue. In this, we but carry out the doctrine almost universally asserted. The reason that swearing the juror is held to determine the election is, that the administration of the oath is the commencement of the trial—the submission of the issue to the jury. The jury being thus charged with the trial of the issue, no juror should be afterwards withdrawn from the panel, except for one of the few grounds sanctioned by the law. The discovery, after the juror is sworn, of a ground of challenge for cause, not previously known, is one of the exceptions to the rule. But when, as in this case, the jurors are not specially sworn to try the particular issue, the trial can not be considered as entered upon, nor the cause submitted to the jury, until the parties have elected them, or some step has been taken in putting the case before them. A challenge, at any time before that, by one whose challenges are not exhausted, should be allowed by the court, as matter of right.—Clark's Manual, § 2376. Under this rule, the Circuit Court erred in denying to the accused the right to challenge the two jurors.—1 Bishop Cr. Prac. § 945; Whar. Amer. Cr. Law, § 3026.

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Here we might close this opinion, but we prefer to express our views on the order in which the right of peremptory challenge should be exercised. As a general rule the plaintiff, or actor, is required to take the initiative—to speak first—in judicial proceedings. He inaugurates the suit, and calls the defendant to account. He first announces whether he is ready for trial; and, proceeding in the trial, he first introduces his testimony. We do not find it positively declared which party shall first make known his challenges. In England, for many long centuries, the Crown or government has had no right of peremptory challenge. In many of the States composing the American Union, the State may challenge a limited number of jurors, without assigning any reason, or showing any cause therefor. Such is the law of Alabama. The number is different in the different States, and usually increases with the magnitude of the offense charged. In *Hayes' case*, 23 Mo. 287, the Circuit Court had refused to compel the prosecuting officer to announce his acceptance or rejection of jurors, until after the prisoner had first made his election known. The court, after stating that “the simplest rule upon this subject, and one to which there would seem to be no objection, is that of requiring the parties to challenge as the jurors are called and pronounced qualified, the plaintiff always speaking first,” came to the conclusion, by a line of argument that does not satisfy us, that the prisoner had not been injured by the ruling of the court. In *Stewart v. The State*, 13 Ark. 720, speaking of the right to challenge jurors, the court said: “We think the correct mode of proceeding * * is, that when a juror is presented, it is the duty of the court to inquire, first of the attorney for the State, and then of defendant, ‘do you accept this juror, or do you challenge him?’” See, on this subject, 1 Bish. Cr. Prac. § 945, and note; Whar. Amer. Cr. Law, § 2956, *et seq*; Bac. Abr. Title Juries, E. 10; *Hooker v. The State*, 4 Ohio, 348; 4 Blackst. Com. 353; *Wilson v. The State*, 31 Ala. 371; *Murphy v. The State*, 37 Ala. 142; *Lyman v. The State*, 45 Ala. 72; *Murray & Bell v. The State*, 48 Ala. 675. In the case of *Lyman v. The State*, *supra*, this court said: “Most clearly the right of challenge may be waived; and when it is waived by the State, and the juror is put upon the acceptance of the accused, and he is accepted by him as one of his triers, the process of his election is complete.” This language clearly implies that on the State is cast the duty of first announcing peremptory challenges; and such, we think, has been the practice of the courts through our whole judicial history. We hold that the Cir-

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cuit Court erred in requiring the defendant to first express his election or rejection of the jurors for his trial.

Reversed and remanded; the defendant to remain in custody until discharged by due course of law.

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1. *Corporation; how may make contracts.*—Unless restrained by legislative enactment to a specific mode of contracting, the contracts a corporation has power to make, may be made in the same manner or form in which a similar contract could be made by an individual.

2. *Same; legislative intention to absolve from debt; presumption as to.*—A legislative intent, upon change or reorganization of a corporation, to absolve it from existing liabilities, cannot be inferred, but must unmistakably appear.

3. *Corporation; what is not a new one.*—The corporation created by the act of 1820, under the style of the "Trustees of the University of Alabama," has not been dissolved or a new corporation created in its stead, by force of subsequent legislation or the constitution of 1868; but its corporate rights and powers have continued unimpaired until the present time.

4. *Trustees of University; powers of.*—The present board of trustees of the University, though their powers have been somewhat changed and enlarged, succeeded to the property, rights and privileges to which the "Board of Education," as "Board of Regents," succeeded under the constitution of 1868, and there being no breach in the continuity of the corporate existence of the University, the present Board of Trustees succeeds to the debts and liabilities of the "Board of Regents," and is answerable therefor at law.

5. *Board of Education; legality of action of.*—Though the legislative power with which the Board of Education was vested, could only be exercised at its regular session at the seat of government, it could lawfully audit and adjust claims against the University, pertaining to it in its corporate capacity as Board of Regents, while the board was at the University and acting as a corporation.

APPEAL from Tuscaloosa Circuit Court.

Tried before Hon. WILLIAM S. MUDD.

Appellee, Washington Moody, brought said suit against the appellant, The Board of Trustees of the University of Alabama, as the assignee of a certain claim alleged to be due the Tuscaloosa Insurance Company for services rendered as fiscal agent of the old body corporate, known as "The University of Alabama," in receiving and disbursing certain moneys belonging to said University.

On the trial the plaintiff read in evidence two resolutions of the Board of Regents of the University of Alabama; one of which was adopted at the meeting of said Board, held in the city of Tuscaloosa on the 22d day of June, 1871, and is as follows:

Resolved, as a settlement of the claim of the Tuscaloosa Insurance Company, for services rendered the University of

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Alabama as its fiscal agent, that a draft be drawn on the treasurer of the University, in the usual way, for one hundred and eighty dollars, payable on the 23d day of July, 1871, and that a like draft be drawn on said treasurer for the sum of three hundred and seventy-five dollars, payable on the 23d day of July, 1876, the annual interest on said latter draft to be paid annually on the 23d day of July of each year until paid, said draft to be made payable to said Tuscaloosa Insurance Company.

The second of these resolutions was adopted at a meeting held in the city of Montgomery on the 6th day of December, 1872, and is as follows :

"Resolved, that the president of the University be, and he is hereby, authorized to settle the claim of ——— Moody in accordance with the resolution of the board, passed at their meeting at Tuscaloosa, June 22d, 1871."

It was then shown that the Tuscaloosa Insurance Company had transferred the claim to the appellee and had ceased to do business.

No draft or check had ever been drawn in compliance with the resolutions, nor had any steps been taken to carry them into effect.

Plaintiff presented the claim to the appellant at their first session after reorganization in July, 1876, and demanded payment, which was refused.

This was all the evidence in the case, and the court, at the request of the plaintiff, gave the following written charge : "That if the jury shall believe the evidence to be true, that then they must find for the plaintiff." To this charge the defendant excepted.

The defendants then asked the following charges : "1. If the jury believe the evidence, all acts, resolutions and regulations enacted or established by the Board of Education, and Board of Regents, relative to the University, its organization and government, under the provisions of section 13 of the act of March 1, 1876, incorporating the present Board of Trustees of the University of Alabama (pp. 268-272, Session Acts, 1875-76) expired on the adjournment of the first meeting of the said board, constituted under said act. 2. That the present body corporate, known as The Board of Trustees of the University of Alabama, incorporated under said act of March 1, 1876, are not legally bound by the resolutions passed by the Regents of the University in reference to the plaintiff's claim, which have been introduced in evidence from the journals of said Regents' proceedings. The court refused to give either of said charges, and the defendant excepted. The various acts of the Leg-

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islature and of the Board of Education, and the constitutional provisions applicable to this case, are so fully stated in the opinion that they need not be further alluded to.

H. M. SOMERVILLE, and J. M. MARTIN, for appellant.—The corporation, which incurred the debt to appellee, died on the adoption of the constitution of 1868, and the common law rule applies that on the civil death of a corporation, all suits pending for or against it abate, and all debts due to and from it are totally extinguished.—Ang. & Ames on Corp. §§ 779, 195 ; 3 Smede & Mar. 791 ; 11 Ala. 472. Hence, when the Board of Education, at the sovereign command of the constitutional convention of 1875, was abolished, it legally perished, and its debts and obligations, of whatever nature, died with it. The fact that the old body corporate, known as the University of Alabama, may have been liable for this debt some fifteen years since, is of no avail ; for the suit is explicitly based on certain promises proved to have been made by the Board of Regents. If these resolutions, therefore, of a deceased body corporate do not breathe a soul of life into this dead claim, now stale with the mould of so hoary an age, the last hope must perish of imparting to it a spark of vitality. It may be true, that if an old corporation be revived, its rights and responsibilities will be revived with it ; but it is equally true that “if the grant operate as a new creation, the new corporation cannot be subject to the liabilities nor possess the rights of the old.”—Ang. & Ames on Corp. § 780. The Board of Trustees of the University of Alabama, the incorporators or trustees of the former, are appointed by the Legislature and the Governor. The latter had full legislative powers given in reference to all the public educational institutions of the State. The former is confined to the management of the University fund and property derived from a certain grant of congress. The laws of the latter had force over every foot of territory and in every county in Alabama. The ordinances of the latter had no force beyond the narrow limits of the University proper, its faculty and students. The one, in fine, was a legislature, as omnipotent within the domain of its constitutional authority, and the scope of its inhibitions, as the British parliament. The other is a mere artificial entity, whose chartered existence may pass away with the fleeting breath of a legislative enactment. And it certainly cannot be said that one is the successor of the other, or that the promise of one has any legal potency to bind the other.

FRANK S. MOODY, *contra*.—The sole question in this case

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depends on the construction of the act establishing the present board of trustees. If, by that act, they became the successors of the Board of Regents, then it is plain that the plaintiff is entitled to recover. The various Boards of Trustees, and the Board of Regents, are but the agents appointed by the State to manage the affairs of the one continuing corporation, "The University of Alabama," established by act of the legislature in December, 1820, and continuing in existence to this day. The name of the agency, and the manner of its appointment, have been several times changed, but the legal entity called by the legislature the "University of the State of Alabama," has never been abolished. The harsh rule of the common law, that a dead corporation owes no debts, and has none owing to it, has never obtained in this State in regard to a public corporation against which rights had attached.—See Wait's Actions and Defenses, vol. 2, page 351. The right created by the performance of the services and acknowledged by the resolutions of the Board of Regents, was beyond the power of the legislature to impair or destroy it. The case of *Broughton v. Pensacola*, 93 U. S. 266, is conclusive of the right of appellant to enforce his remedy at law, and it is also conclusive that the debt here sought to be enforced is a legal liability of the Board of Trustees as at present organized. They acquired all the property of the former corporation, and they took it burdened with all its liabilities, and subject to every remedy for their enforcement that would have existed had no change been made.

BRICKELL, C. J.—The technical rule of the ancient common law, "that a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal," if it ever obtained in this country, is now obsolete. Unless restrained by legislative enactment to a specific mode of contracting, the contracts a corporation has capacity to make, may be made in that manner or form, in which a similar contract by an individual could be made. "The acts of the board of directors, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under their corporate seal." 2 Kent, §47. The resolutions, or declarations, or admissions of the Board of Regents, (it is not material what is their form), are as full evidence of an indebtedness due from the University to the appellee, as would have been the promissory note, or an account stated with an individual. Neither the consideration of the debt, nor the capacity of the Uni-

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versity to contract it, is disputed; and in no more appropriate mode could it have been recognized, and its amount and the time of payment expressed.

The debt rests upon the corporation. It is in a large sense a public, rather than a private corporation. Though legislative power may not divert from its uses the donation of the lands made by Congress, or the donations of individuals, (*Vincennes University v. Indiana*), 14 How. 2681; yet, it may alter, amend, vary or enlarge the original act of incorporation.—*University v. Winston*, 5 Stew. & Por. 17. The act of Congress, enabling the people of the Alabama Territory to form a constitution and State government, and for the admission of the State into the Union, required "that thirty-six sections, or one entire township, to be designated by the Secretary of the Treasury, under the direction of the President of the United States, together with the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the legislature of the said State, to be appropriated solely to the use of such seminary by the said legislature." On the 18th December, 1820, the legislature established as the beneficial donee of the trust, a *seminary of learning*, and denominated it "The University of Alabama." Its corporate name and style was, "The Trustees of the University of Alabama." In 1822, by statute it was declared, "the title of the lands, which this State has received as a donation from the Congress of the United States for a seminary of learning, is hereby vested in the said trustees and their successors in office," &c.—Clay's Dig. 583-586. The board of trustees was composed of the governor, the judges of the Supreme Court, and one trustee from each judicial circuit, except that in which the University is located, in which there were two, and these were elected by the legislature. Under this corporate organization, the University continued until the adoption of the constitution of 1868. That constitution placed the "common schools, and other educational institutions of this State, under the management "of a Board of Education, consisting of a Superintendent of Public Instruction and two members from each congressional district." This board was clothed with "full legislative powers in reference to the public educational institutions of the State," and its acts, "when approved by the governor, or when re-enacted by two-thirds of the Board, in case of his disapproval," had the force and effect of law, unless repealed by the General Assembly. The style of its acts was prescribed, and it was required to meet annually at the seat of government at the same time as the General Assembly. It was

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declared "a body politic and corporate, by the name and style of the Board of Education of the State of Alabama," and "a Board of Regents of the State University."—Const. 1868, Art. 11. This Board was abolished by the constitution of 1875, and the University was placed under the management and control of a Board of Trustees, consisting of two members from the congressional district in which the University is located, and one from each of the other congressional districts of the State. The Governor was declared *ex officio* a member and the president of the board. The General Assembly, by an act approved March 1, 1876, declared the trustees a body corporate, and the corporate name "The Board of Trustees of the University of Alabama." The sixth section of the act declares, that in addition to the rights, properties, privileges and franchises thereby expressly granted, "all rights, properties, privileges and franchises heretofore vested by any act of the General Assembly in the University of Alabama, shall continue and vest in the corporation as a part of the rights, privileges and franchises of the corporation under this charter." The 13th section is as follows: "That all laws, and parts of laws, enacted by the General Assembly, except sections 429, 430 and 1017 of the Revised Code, and acts passed by the General Assembly at its present session, and all acts, resolutions and regulations enacted or established by the Board of Education and Board of Regents relative to the University, its organization and government, shall expire on the adjournment of the first meeting of the board constituted by this act; and all other laws in conflict with its charter are hereby repealed."

If we admit the legislative power, (a question this case does not involve), to dissolve the corporation created by the enactment of 1820, and to create a new one in its place, we are not of opinion the power was exercised by either the provisions of the constitution of 1868, or the act of March 1, 1876. The seminary of learning, established by the act of 1820, as the "University of Alabama," has continued in existence, and is recognized as existing by the constitution of 1868, and the subsequent legislation. The only effect and operation of the constitution of 1868, was to transfer its management and control from the Board of Trustees, to whom it was committed by the act of 1820, to the Board of Education as a Board of Regents. Whatever of corporate power the Board of Regents had, was not defined and declared by the constitution of 1868, or by subsequent legislation. It was derived by their succession to the corporate powers conferred by existing legislation on the trustees of the University. That corporation continued, and there was

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simply a change in the style or corporate name, and the manner of electing and appointing the board of management and control. This is equally true of the act of 1876, which treats the University as an existing institution. It simply revises former legislation, super-adding such new corporate powers, rights and privileges, as were deemed necessary to advance the interests of the University; and the Board of Education having been abolished, re-establishes as its governing power, and the agency through which it was to act, a Board of Trustees. All the legislation and the provisions of the constitution of 1868, preserve the corporate identity of the University, as it was established by the act of 1820.

Nor is there found in the act of March 1, 1876, any indication of a legislative intent to absolve the corporation as reorganized, from any debt contracted, or liability incurred, under its former organization. With these the legislature had no purpose, if it had the power of interfering. These remained, if valid, as binding upon the corporation, as if a change in its board of management and control had not been rendered necessary by the abolition of the Board of Regents. It is not to be presumed from the general words of the 13th section, repealing "all acts, resolutions and regulations enacted or established by the Board of Education and Board of Regents relative to the University," that it was intended to impair the obligation of contracts which, in their corporate capacity, they had made. These words import an intention to repeal the acts of the Board of Education in its legislative capacity, and this was within legislative competency, furnishing no just cause of complaint by individuals upon any other ground than that of policy. The debts and engagements of a corporation, are not the subject of legislative repeal, though the change, or modification, or unconditional repeal of its charter may be within legislative power. When such power exists, an intention to interfere with corporate contracts is not to rest on inference or presumption.—*Broughton v. Pensacola*, 93 U. S. 266. In this case, it is said by Justice FIELD: "When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities, as well

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as the rights of property of the corporation in its old form, should accompany the corporation in its reorganization." And it is further said: "The principle which applies to the State would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the State, whatever changes may take place in its constitution of government." "Where a statute does not, in express terms," said this court in *State v. Mayor*, 24 Ala. 706, "annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act, and under its former name." And in *Ready v. Mayor*, 5 Ala. 336, it was held that a mere change in the corporate name, does not affect the rights or liabilities of a corporation. If the legislative act making the change, reserves these liabilities and rights, the reservation is no more than the affirmation of what the law would have implied in its absence.—See, also, *Madison College v. Burke*, 6 Ala. 496. It follows, from what we have said, that as the present Board of Trustees of the University have succeeded to the property, rights and privileges to which the Board of Regents succeeded; and as there has been no break in the continuity of the corporate existence of the University, they succeed also to their debts and liabilities. The legal remedies which could have been pursued against the Board of Regents, may now be pursued against the Board of Trustees.

It may be, and doubtless is true, that the legislative power of the Board of Education could be exercised only in its annual sessions at the seat of government. But the adjustment of claims against the University pertained to it in its corporate capacity as a Board of Regents, and the adjustment could be properly made at the University when the Board was acting as a corporation.

Affirmed.

Randolph v. Little.

Garnishment.

1. *Garnishment; main enquiry in.*—In garnishment suits the main enquiry is whether the garnishee is indebted to the debtor in such form as that the debt can be condemned to the satisfaction of the plaintiff's judgment; if there be an indebtedness liable to condemnation, there should be a judgment in

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favor of the judgment or attaching creditor against the garnishee; if there be no indebtedness, or such indebtedness as can not be condemned, judgment should be rendered discharging the garnishee.

2. *Garnishment; exemption as to debt sought to be subjected; when lost.*—A claim or demand sought to be subjected by garnishment, may be the subject of a valid claim of exemption by the judgment debtor; but if he delays to assert it until after judgment in favor of the attaching or garnishing creditor against the garnishee, the exemption is lost and can not afterwards be asserted. (Overruling *Webb v. Edwards*, 46 Ala. 16.)

3. *Order; what void.*—After judgment in favor of the garnishing creditor against the garnishee, the court has no authority to entertain the original debtor's claim of exemption, and direct the sheriff to pay over the money collected on the judgment to him; such an order is void.

4. *Garnishment; what judgment in, irregular.*—A judgment against the garnishee for the amount of the original recovery against the judgment debtor, and also for "all costs of the original proceedings," &c., is informal, in that it does not set forth *in numero*, in the judgment of condemnation, the amount of such costs, and fails to give the garnishee authoritative evidence of the amount of credit he is entitled to claim of the judgment debtor. This, however, is but a clerical error, which will be corrected on motion in the court below, or in this court if the record furnishes sufficient data.

5. *Same; what judgment not informal.*—The judgment in the garnishment, however, is not informal, because it fails to set forth *in numero* the amount of costs adjudged in that proceeding. The costs are not taxed until after the judgment is rendered, and the garnishee is not entitled, as of course, to credit for all the costs of the proceedings; for they may have been increased or incurred by his own fault, in which event he cannot claim credit as to such costs.

6. *Exemptions; what affidavit claiming should show.*—As the right of exemption is governed by the law in force when the debt was contracted, a claim of exemption, under the constitution of 1868, against process issued on a judgment rendered since then, on a debt which may have been contracted before the adoption of that constitution, should state with certainty when the debt was contracted, that the court may determine whether the debtor is entitled to the exemption claimed.

APPEAL from Etowah Circuit Court.

Tried before Hon. W. L. WHITLOCK.

The appellee, Hiram Little, having obtained a judgment against one Rosseau, sued out a garnishment against the appellant, Ryland Randolph, on the 2d day of June, 1875. The affidavit filed to secure the writ, is in the usual form, and alleged the recovery of judgment against Rosseau and another, at the fall term, 1872, of the Circuit Court of Etowah county, and a supposed indebtedness to Rosseau by the appellant. Appellant answered, admitting the existence of a contract with Rosseau, under which, if the work was completed as therein specified, there would be a balance due the said Rosseau. On the 28th day of December, 1875, Rosseau made an affidavit before a justice of the peace, which was filed in the cause on the 24th day of January. In this affidavit he does not show that he is a resident of this State, but simply claims the sum due "as exempt from the above named process of garnishment and levy by attachment or otherwise, and he claims the same as exempt from the above named process of law, and claims his right for self and family

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as the same is guaranteed to him by the laws of the State of Alabama."

On the 24th day of April, 1877, a judgment final was rendered in the garnishment suit, to which no objection appears to have been taken. The judgment entry recites that "it is therefore considered that the plaintiff thereupon have and recover judgment against the said Ryland Randolph, garnishee, for the sum of three hundred and sixty-eight 1-100 dollars, being the amount of the original judgment against the defendant in this court on the 2d day of November, 1872, and the interest thereon, and that the plaintiff have and recover of the said garnishee all the costs of the original proceedings against the defendant, and in this behalf expended, for which let execution issue." On the same day, but after the rendition of judgment, Rosseau filed an affidavit, in which he avers "that he is a *bona fide* resident of the county of St. Clair, in this State, and has been for many years last past;" that he is not the owner of personal property to the value of one thousand dollars." The affidavit then set out the facts in relation to the garnishment suit, and proceeds: "Affiant states that the same is exempt to him under the constitution and laws of this State, he not being the owner of personal property worth one thousand dollars, and he now files his claim to the same, and will, at the proper time, move the court to discharge the garnishee." On the same day, Rosseau moved the court "to set apart to him the amount of the judgment as exempt under the laws of this State in favor of the defendant, who is and was at the time of the service of the garnishment the head of a family and a *bona fide* resident of said State of Alabama, and to direct the full amount of said judgment to be paid over to him, by the sheriff, officer, or other person collecting the same." On the 28th day of the same month, the court made an order granting the motion, and directing the sheriff to pay the amount collected on the judgment to Rosseau as exempt. From the judgment final, and order made on the motion of Rosseau, Randolph appeals to this court.

TAUL BRADFORD, for appellant.

JOHN W. INZER, *contra*.

STONE, J.—We do not doubt that a claim or demand, sought to be condemned in garnishment to the satisfaction of a judgment, may be the subject of a valid exemption claim, when properly set up by the judgment debtor. But, to be availing, such claim must be interposed before judgment is

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rendered against the garnishee. Till then, the proceedings are in *feri*, and the proper inquiry is presented, whether the garnishee is indebted to the judgment debtor in such form, as that the debt can be condemned for the payment of plaintiff's judgment. If there be a debt, and that debt is liable to condemnation, then the proper judgment is against the garnishee, and in favor of the judgment, or attaching creditor. On the other hand, if there be no debt, or, if the debt be not subject to process of garnishment, then the proper judgment is to discharge the garnishee, and thus leave the relations of the garnishee and judgment debtor as they were before the writ of garnishment was served. Garnishment is a statutory action, and can result only in a judgment against the garnishee, or in a judgment discharging him. Contested answers, and collateral issues may arise, but they, at last, resolve themselves into the inquiry of indebtedness *vel non* from the garnishee to the judgment debtor, and its liability in the given suit.

The plaintiff Little, in June, 1875, made and filed his affidavit for garnishment, in usual form, setting forth that he recovered judgment against Rosseau and another in 1872, and stating that Randolph was supposed to be indebted to Rosseau. The writ of garnishment was issued and served on Randolph June 28th, 1875. There is found in the record an affidavit made by Rosseau, bearing date December 28th, 1875, which was filed in court January 24th, 1876, but it is wholly insufficient in averments to support a valid claim of exemption. We will treat this case as if that affidavit had not been made or filed. On the 24th of April, 1877, judgment final was rendered in the garnishment suit against the garnishee, to which no exceptions were reserved. The judgment is that the plaintiff "have and recover judgment against the said Ryland Randolph, garnishee, for the sum of three hundred and sixty-eight 1-100 dollars, being the amount of the original judgment against the defendant in this suit, on the 2d of November, 1872, and the interest thereon—and that the plaintiff have and recover of the said garnishee, all the costs of the original proceedings against the defendant, and in this behalf expended." This judgment is informal in this: It should have expressed the amount of costs in the original suit, and should have adjudged that sum *in numero*, as part of the judgment of condemnation. For the sum forced out of Randolph by garnishment, including the costs of the original suit, he will be entitled to a credit, on the debt he owes to Rosseau; and it is not just to the garnishee that the sum be left in uncertainty. The costs of the garnishment suit stand on a different footing. They are not taxed until after

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judgment rendered, and in paying the one, the garnishee pays the other, and thus obtains a statement of the amount, which will enable him to claim his proper credit. Such costs are taxed in the identical suit he is settling, are *quasi* records, and are part of the judgment rendered. There is still another difference. It is not a matter of course that all the costs in the garnishment suit will be allowed as a credit to the garnishee. If costs in such suits are incurred, or increased by the fault of the garnishee, then such increased costs should be borne by the garnishee personally.

The error or informality pointed out above—namely, the failure of the judgment entry to state the amount of the costs in the original suit, and adjudge their payment *in numero*, was and is but a clerical error, which the court below could and would have corrected at any time. It can be done yet; and for this purpose, we leave this question open for further action in the Circuit Court, if deemed necessary. We would ourselves, if the record furnished the requisite information, here correct the error at the cost of the appellant.—Code of 1876, § 3946; 1 Brick. Dig. 82.

After the judgment was rendered in the Circuit Court in favor of Little and against the garnishee, but on the same day, Rosseau, defendant in the original cause, filed his affidavit, claiming that the recovery in the garnishment suit was exempt to him as a *bona fide* resident of this State. The court thereupon made an order, directing the sheriff or other officer collecting the judgment in the garnishment cause, to pay the money when collected, not to Little, in whose favor the judgment was rendered, but to Rosseau on his claim of exemption. In making this order, we suppose the court was controlled by the case of *Webb v. Edwards*, 46 Ala. 17, from which this case cannot be distinguished. We dissent from and overrule the majority opinion in that case, and agree, in the main, with the views of Peck, C. J. As we have said above, the Circuit Court had jurisdiction to discharge the garnishee, or to render judgment against him. After the judgment was rendered against the garnishee, that court had no authority to make the order that the money, when collected, should be paid to Rosseau. That order was without jurisdiction, is void, and is hereby vacated.

The judgment of *Little v. Rosseau* was rendered in 1872. It is not beyond the range of conjecture that the debt on which it was rendered was contracted before the constitution of 1868 was put in force. If so, the claim of exemption should have been founded on the statutes in force before that time, and not on the constitution of 1868.—*Wilson v. Brown*, 58 Ala. 62; *Taylor v. Anthony*, 55 Ala. 322. The affidavit in

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this case is insufficient, in that it fails to set forth enough to show by which exemption statute the claimant's rights are to be measured.

This decision is not a reversal of any judgment, to the prejudice of Little, the appellee. With the exception of the order annulling the judgment of the court that the money, when collected, be paid to Rosseau, we do not disturb the ruling of the Circuit Court. On one point we reverse and correct the judgment. We do not formally affirm the judgment, because we would thereby merge the judgment of the Circuit Court in ours, and thus preclude any amendment in the court below.—*Stephens v. Norris, Stodder & Co.*, 15 Ala. 79.

Let the appellant pay the costs of this appeal, but no damages are imposed.

Reversed and corrected.

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Bill in Equity for Rescission of Contract.

1. *Rescission of contract; what will not authorize.*—The purchaser of lands sold at public auction, in pursuance to an advertisement, which describes the tract sold as containing about fifty-six acres, is not entitled to a rescission of the contract of sale, because he was deceived or misled as to the real boundaries of the tract he was buying, when he fails to show that he did not receive the quantity he bid for, and when the land embraced between the real and supposed boundaries is not shown to have any special value as compared with the average of the tract purchased; and especially is this true, when the tract is shown to have on it a fine residence, and the land between the boundaries is shown to be without improvements, save a fence, and of comparatively little value.

2. *Same; what waives right to claim.*—If the purchaser of lands at such sale, after becoming aware of the misrepresentation, complies with his contract by paying the cash payment and giving notes for the deferred ones, he thereby waives his right to a rescission of the contract.

APPEAL from Marengo Chancery Court.

Heard before HON. CHARLES TURNER.

On the 21st day of December, 1872, the appellee, Josiah T. Evans, as administrator with the will annexed, of Mary Bryan, sold at public auction, a certain piece of land belonging to said estate. This land was described in the advertisement for the sale as "all that part of the east half of the south-west quarter of section ten, in township sixteen, range two, east, in said county of Marengo, lying east of the road leading from Linden to Moscow (or Jefferson), known also

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as the late residence of J. R. Bryan, deceased, but belonging to his mother, Mary Bryan, containing about fifty-six acres." The appellant, Matthews W. Davis, became the purchaser at the sale for the sum of thirty-seven hundred and ninety dollars, payable one-third cash and the balance in one and two years with interest from the day of sale, to be evidenced by notes with two approved sureties. Appellant, Davis, made the cash payment, executed his notes with F. P. Snedecor and A. J. Arrington as sureties for the deferred payments, and went into possession, and has remained in possession. Evans executed to him his bond for title. The notes for the deferred payment not being paid, the appellee brought suit on them against Davis and his sureties. Thereupon the appellant filed his bill, in which he alleged that on the day of the sale, because a bidder, and pending the sale, he, being a stranger, asked the appellee to show him the boundaries of the land, and that appellee then showed him "all the land lying between the Pin Hook road on the east, and the Linden and Moscow road on the west, and a certain fence on the north, all of which were plainly visible, and that Evans then stated that he was selling the land and improvements between the said roads." The bill further avers, that before the first of these notes fell due, the appellant discovered that the appellee "had made a misrepresentation of facts at the time of sale in regard to the boundaries of the land sold by him, and that a large portion of said land, to-wit, about twenty acres lying on the eastern side of tract, and included in and embraced by the boundaries pointed out by said Evans, did not belong to the estate of Mary Bryan, and that he had no right to sell the same, and could not then, and cannot now, make title thereto.

The bill then prayed that the sale be set aside, and that the cash payment made by appellant be refunded, or if the court was of opinion that the sale should stand, that a proper allowance should be made by way of abatement in the price, and that an injunction also be granted to restrain Evans from prosecuting his suit on the notes. The allegations of misrepresentations by Evans were flatly denied in the sworn answer required of him, and it was there set up that after the sale, and before the payment of the cash payment or the execution of notes sued on, Evans went with the appellant and showed him the exact lines of the place, and that he was then informed that there was a strip of land, inside of the enclosure, which did not belong to the estate. It was shown that the land in the enclosure, which did not belong to the estate of Mrs. Bryan, consisted of a narrow strip of land running along the road, and that there were no

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improvements on it except a fence, which separated it from the road. There was no evidence as to the value of this strip, as compared with the tract purchased by Davis at the sale, nor is there any proof of the quantity of land which Davis did get under his purchase. Sandusky, a witness for appellee, testified that he acted as auctioneer at the sale in December, 1872, and that soon after Davis took possession, and early in 1873, that "he and Davis walked in the field on the eastern side of the place, and he, Davis, showed me where Dr. Evans had pointed out as about the eastern line," and "asked me if he should make a fence on the line." Other witnesses for the defendant testified to the fact that Davis knew, soon after his purchase, that the eastern boundary of his land did not reach the road. A temporary injunction was granted on the filing of the bill. On the final hearing, the Chancellor dissolved the injunction and dismissed the bill, and from that decree Davis appeals to this court.

WATTS & SONS, for appellant.—The weight of the testimony shows that Evans did have a conversation with Davis in regard to the boundaries, while the sale was going on, and that Evans did misrepresent the boundaries. These representations constituted a fraud, whether Evans knew at the time they were false or not.—1 Brick. Dig. 688, § 705. This evidence would clearly have authorized a rescision of the contract, if Davis had acted promptly after discovering the truth. It is said, however, that he has lost all right of complaint in equity, because he paid a portion of the purchase-money after he discovered the representations. This is not a true proposition of law. By doing any act after the discovery of the fraud, indicating an intention to stand by the terms of the contract, he may have forfeited his right to a rescision, but this would not prevent him from asserting his right, and insisting on an abatement of the purchase-money.—See 7 Ala. 742; 4 Ala. 21; 34 Ala. 663; 26 Grattan, 444; 1 Robt. (Va.) 287; 32 Ala. 410.

H. A. WOOLF, *contra*.—Equity requires diligence in the discovery and exposure of fraud, and a rescision sought on account of fraud must be made as soon as it is discovered, and a bill which discloses on its face a want of diligence is without equity.—40 Ala. 242; 38 Ala. 42; 34 Ala. 633; 31 Ala. 219. The right of rescision is lost by affirmance or by failure to manifest an election.—29 Ala. 420; 2 St. 520. The court is also cited to the following authorities:—9 Ala. 285; 23 Ala. 755; 33 Ala. 530; 45 Ala. 204; 37 Ala. 573; 42 Ala.

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168 ; 29 Ala. 393 ; 33 Ala. 210 ; 1 Brick. Dig. pages 686, 688, 689, §§ 681, 682, 683, 716, 717, 718, 720, 721.

STONE, J.—The advertisement under which the lands in controversy were sold, describes the tract or lot as containing about 56 acres. It is not claimed, either in the pleadings or proof, that Davis, the purchaser, did not get the quantity represented, and sold to him. Neither is it averred or proved that the strip of land, which Davis alleges he lost, has any special value above, or even equal to the average of the tract he purchased. The proof is, that the lost strip is without improvements, other than a fence, and that it is of very little actual value. If the complainant were to recover the lands he claims, or the value of that part which lies outside of his boundary, he would evidently get in quantity more than he bargained for.

In addition to this want of specific averments of injury, there is indefiniteness and contrariety in the proof, as to the representations made by Evans. Sandusky testifies that about January, 1873, soon after Davis took possession, he, Davis, knew his eastern boundary did not reach the public road; and that he stated Evans had thus pointed out his line to him. Other witnesses speak of Davis' early knowledge of the strip between him and the road, which his bond for title did not embrace. Yet, he waited near three years after his purchase, and until he had been sued for the purchase-money, before he asserted he had been deceived by Evans' misrepresentation of the boundary. We think the complainant has failed, in every phase of his case, to make a case that would justify us in reversing the very careful decree of the Chancellor.—*Kelly v. Allen*, 34 Ala. 663 ; *Fore v. McKenzie*, Dec. Term, 1878.

Affirmed.

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Bill in Equity for Subrogation.

1. *Revised Code*, § 495 ; *character and extent of lien declared by*.—The lien created by § 495 of the Revised Code, is not like that of an execution, a mere legislative remedy; but the bond of the tax collector being a contract by which the law had previously declared liens should be created, such lien is a lien by contract, so far as all parties to the bond are concerned. The lien operates as a mortgage in all respects, except that it confers no rights which can be en-

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forced at law, and can be carried into effect, as a specific lien, only in a court of equity.

2. *Same ; what lien created by, not dependent on*.—It is not necessary that the amount of the default of the tax collector should have been ascertained by a judgment at law ; such default may be ascertained and determined, and the lien enforced, by a proceeding in equity.

3. *Same ; right of sureties to be subrogated to rights of State or county, as to lien declared by*.—The sureties of a defaulting tax collector, who have been compelled to make good the default of their principal, are entitled to be subrogated to the rights of the State or county, and to have the lien created by the bond in favor of the State or county enforced for their indemnity ; and this, though the collector, who was absent from the State, was not proceeded against by the State or county, and the sureties paid the judgment against them for their principal's default : and such lien attaching from the execution of the bond may be enforced against the property of their principal in the hands of the purchasers, who are charged by law with notice of the lien.

4. *Surety ; what necessary to entitle to subrogation*.—Until a surety has paid the debt of his principal, he cannot be entitled to contribution, but it is not necessary that the payment should have been made in money ; whatever discharges the principal from liability to the common creditor, and is accepted by him as a payment, will operate as such in payment by the surety.

5. *Case criticised*.—The definition given in *Perrine v. Fireman's Ins. Co.*, 22 Ala. 576, of the term "*means of satisfaction*," is too narrow.

APPEAL from Choctaw Chancery Court.

Heard before Hon. A. W. DILLARD.

In February, 1869, one Joseph J. L. DuBrutz was appointed tax collector of Choctaw, and gave bond as such, with the appellees as his sureties thereon. At the time of his appointment, DuBrutz owned certain real estate, which is described in the bill. In November, 1870, DuBrutz sold and conveyed these lands to the appellants, who purchased with knowledge that he was tax collector, and have since been in possession. In 1872, suit was commenced by Reynolds, Auditor, for the use of the State, in the Circuit Court of Montgomery county, against the appellees as sureties of said DuBrutz, and a judgment was rendered against them in June, 1873, which they have paid. DuBrutz was not proceeded against, he having left the State.

At the fall term, 1874, of the Circuit Court of Choctaw county, motion was made against the appellees for the amount of the taxes due the county. A compromise was effected in the spring of 1876, the appellees compromising with the Commissioner's Court of Choctaw county, and gave their note in satisfaction of the amount agreed on.

The appellees now file their bill asking to be subrogated to the lien of the State and county, and that such steps as are necessary be taken to enforce said lien. A demurrer was interposed by the appellants, on the following grounds : 1. Because the lien upon the property of the tax collector is a specific, special lien for the sole benefit of the State and county, and to the benefit of which the complainants are in no wise entitled. 2. The bill fails to show any judgment in favor of the State

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of Alabama, or the county of Choctaw, against said tax collector. 3. Said bill avers that said execution and judgment have been paid, satisfied and extinguished by said sureties, and there is no lien or grounds of equity in complainant's bill. 4. That the bill fails to show any valid legal judgment in favor of Choctaw county against said tax collector or complainants, as his sureties. 5. The bill fails to point out any specific default by said tax collector. 6. The bill shows no ascertained legal liability against said tax collector. 7. Said bill shows that complainants are simple contract creditors of said tax collector, and have no cause of complaint against these defendants in a court of equity. The court overruled the demurrers, and the defendants bring the case here by appeal.

THOMAS W. COLEMAN, for appellants.—Section 495 of the Revised Code, provides a lien in favor of the State and county, for the amount of any judgment that may be recovered against the tax collector in his official capacity. The same lien is reserved also against the sureties of the tax collector, from the date of his default. There was no judgment against the tax collector, and therefore no lien capable of enforcement by the State or county, and the sureties can stand on no higher ground. The judgment in favor of the State was paid and discharged before the filing of the bill. This judgment was never assigned to the sureties, but was absolutely extinguished. The lien created on the property of the tax collector is a special statutory lien, which cannot be extended. The lien is for the benefit of the State or county alone, and was never intended to protect or indemnify any other person. The cases cited by the appellees have no application to this case. They were cases of contract liens, and decisive of rights between the parties to these contracts. No such rights are involved.—See 36 Ala. 118; 14 Ala. 198; 3 Ala. 310; 1 Story's Eq. Juris. § 499; and 25 Ala. 258.

THOMAS COBBS, *contra*.—The payment of the judgment by the sureties, gave them, as against DuBrutz and those purchasing from him with notice, all the rights and securities of the sale, and they stand in the place of the State to enforce these remedies.—1 Ala. 23; 2 John. Ch. 554; 22 Ala. 782. A person taking any of the securities from the principal, with notice of his responsibility, is bound in equity to hold them for the indemnity of the sureties, and is subject to all the equities which the creditor could originally enforce. 33 Ala. 261; 23 Miss. 371; 27 Miss. 679; 1 Lead. Eq. Cases,

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106. The right of subrogation does not depend upon any contract or request by the principal debtor, but rests upon principles of justice and equity.—4 John. Ch. 123; 1 N. Y. 595. The lien created by the statutes is an equitable mortgage, and the payment of the debt by the surety did not discharge the mortgage; it simply took away the right of the State to sue the principal, and it still stands for the security of the sureties. They hold a lien under the mortgage, and may go into equity to enforce it without exhausting their legal remedies.—7 Ala. 318; see *Dallas County v. Timberlake*, 54 Ala. 403.

BRICKELL, C. J.—The Revised Code of 1867, § 495, declared the bond of a tax collector “operates from its execution as a lien in favor of the State or county, on the property of such tax collector, for the amount of any judgment which may be rendered against him in his official capacity, for State or county taxes, and on the property of his securities from the date of his default.” The same provision was carried into the revenue law of 1868, which was of force when the appellees became sureties on the official bond of Joseph J. L. DuBrutz as tax collector for Choctaw county. Pamph. Acts 1868, p. 312, § 44. We had occasion to consider and pass upon this statutory provision in *Dallas County v. Timberlake*, 54 Ala. 403, and we held the lien it creates is not like that of a judgment or execution of a court of law, a mere legislative remedy, or the mere incident of a judgment, created by legislation, “but a tax collector’s bond being a contract, by which the law has previously declared liens shall be created, its liens are liens by contract, on the part of the persons who execute the bond, as much as that of a mortgage would be. Such lien is intended, also, to be a security quite as effectual for the benefit of the State and county, from the time the lien operates, as a mortgage would be to a mortgagee, with this difference, that it would not, as a mortgage might, give a right of action at law, but can be carried into effect, as a specific lien, in a court of equity only.” It was further held, the lien was not dependent on obtaining a judgment at law, ascertaining the amount of the default of the tax collector, but that the default could be ascertained and determined, and the lien enforced by a proceeding in equity.

The particular question now presented, is, whether the sureties of the tax collector, who, by judgments against them in favor of the State and county severally, (in suits to which the tax collector was not a party, because he had left the State), have been made answerable for his defaults, are

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entitled to subrogation to this lien. Subrogation is a term borrowed from the civil law. In *Houston v. Br. Bank*, 25 Ala. 257, it is defined as "the substitution of a new for an old creditor;" or, in its more general sense, "the act of putting by transfer, a person in the place of another, or a thing in the place of another thing." By this transfer "the new creditor is subrogated to all the rights of the original creditor." The principle upon which the whole doctrine of subrogation, not only as it is applied for the protection of sureties, but as it is applied to compel him who is primarily liable, or the thing which may be primarily liable to bear a burthen, to continue to bear it for the relief of him, or another thing, secondarily liable, does not depend upon contract, but has its foundation in natural justice, and is said by Ch. Kent to be "recognized in every cultivated system of jurisprudence." No doctrine can be more firmly established, than that a surety who has paid the debt of the principal, is entitled to stand in the place of the creditor, as to all securities for the debt, held or acquired by the creditor, and to have the same benefit from them as the creditor might have had, if the surety had not paid, and the creditor had resorted to them.—*Cullom v. Emanuel*, 1 Ala. 23; *Foster v. Athenæum*, 3 Ala. 302; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Houston v. Br. Bank*, 25 Ala. 250; *Fawcetts v. Kimmey*, 33 Ala. 261; *Troy v. Smith*, *ib.* 459; *Lyon v. Leavitt*, 3 Ala. 430; 1 Story's Eq. § 499, *et seq.*; 1 Lead. Eq. Cases, (4th Ed.) 136; 2 *ib.* 277; Brandt on Suretyship, §§ 260-282. As a necessary consequence of this right of the surety, it is well settled on authority, that if the creditor, without the consent of the surety, parts with or renders unavailable, any security or fund, which he has the right to apply in satisfaction of the debt, the surety is exonerated to the extent of the value of such securities. The reason is, that such securities or fund are impressed with a trust for the payment of the debt, and the creditor is bound to apply them, or hold them as a trustee, ready to be applied for the benefit of the surety.—*Cullom v. Emanuel*, 1 Ala. 29; *Cheeseborough v. Millard*, 1 Johns. Ch. 409; *Hayes v. Ward*, 4 Johns. Ch. 123; Brandt on Suretyship, §§ 370-372. The principle is sometimes expressed in another form: "that when a creditor has the means of satisfaction in his own hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety to that extent will be discharged."—*Perrine v. Firemen's Ins. Co.* 22 Ala. 576. "Means of satisfaction," in this case, this court said, "signifies property or money of the principal debtor in his lawful possession, which he may rightfully retain and appropriate to the satisfaction of his

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debt, without violating any duty or subjecting himself to an action; in other words, there must be a lien in his favor on the property in his hands, conferred either by law or the owner, which is defined to be a right of retainer."

The last clause of the sentence quoted, is too narrow to be taken as a definition of the term, *means of satisfaction*. These words embrace every case of a lien or a trust, created by law, or by contract, which gives to the creditor the right to charge the property of the principal debtor with the payment of the debt, as well as cases in which he may have possession of the property or effects of the principal, and a right to retain possession until the debt is satisfied. The word *lien*, at common law, was originally of much narrower signification, than at the present day. Then, it was a mere right to retain possession until a debt was satisfied, and was lost if the possession was parted with voluntarily. Now, it is employed to designate all the various charges of debts upon land or personalty, whether created by contract, or by statute, or recognized in courts of equity, or by the maritime law." Thus, we have the lien of a judgment; the lien of an execution; the lien of a partner; the lien of a legal or equitable mortgage; the lien of a vendor," (the lien of a landlord for rent, or for advances to the tenant), "and various other charges which are denominated liens; and in courts of equity, the term *lien* is used to denote a charge or incumbrance on a thing, where there is neither *jus in re*, nor *jus ad rem*, nor possession of the thing."—*Donald v. Hewitt*, 33 Ala. 547. All these are intended, and are in fact and in the contemplation of law, but a security for the debt to which they may be attached. The *lien* of a vendor for the purchase-money of lands, does not spring from contract—it is excluded, if the parties contract for a specific lien, or if other security is taken. It is implied or raised by a court of equity, because it is deemed inequitable, that one man should get and keep the estate of another without paying the purchase-money. There are other *liens* raised by a court of equity, resting upon the same broad considerations of advancing right and justice between parties.

Whenever such liens exist, courts of equity have generally held the surety on paying the debt of the principal, was entitled to subrogation to them, and have held, as a consequence, that if the creditor parted with them, or voluntarily rendered them unavailing to the surety, without his consent, the surety was *pro tanto* discharged. We have several decisions which hold, that if an execution issuing on a judgment against principal and surety, is levied on property of the principal debtor sufficient to satisfy it, a release of the prop-

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erty by the creditor, discharges the surety.—*State Bank v. Edwards*, 20 Ala. 512; *Winston v. Yeargin*, 50 Ala. 340; *Summerhill v. Tapp*, 52 Ala. 227. Following the case of *Mayhew v. Crickett*, 2 Swans. 185, the doctrine of the court is, that the creditor is a trustee of his execution for the benefit of the surety, and though not bound to active diligence, though he may, if he will, remain passive, yet, if he voluntarily interferes and by his own act releases the lien, the surety is discharged. Even after judgment against principal and surety jointly, the principle is settled, that the relation of principal and surety continues, and if the creditor enters into an agreement binding him, by which time is given the principal, without the consent of the surety, he is discharged.—*Comegys v. Booth*, 3 Stew. 14; *Carpenter v. Devon*, 6 Ala. 718. It does not lie within our province to enquire whether the case of *Callar v. Vivian*, 8 Ala. 903, is consistent with the decisions to which we have referred.

There is a conflict between the English Court of Chancery, and the current of decisions in this country, as to the extent of the right of the surety to subrogation to the rights and remedies of the principal. In England, it seems to have been limited to independent collateral securities for the payment of the debt, held by the creditor, and was not permitted to embrace "collateral incidents and dependent rights growing out of the original debt." Or, as it is expressed by Lord ELDON in *Capis v. Middleton*, 1 Turn. Russ. (11 Eng. Ch. 131), it was applicable only "to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor." This qualification of the equity of the surety, is not consistent with the opinion of Ch. KENT in *Cheeseborough v. Millard*, *supra*, which he founds on earlier cases in the English Court of Chancery, "and to which," said C. J. GIBSON, "he would doubtless have added *Glossop v. Harrison*, chapter 61, had it been known in this country, but it was made only a few months before." The Court of Appeals in Virginia disapproved of this limitation or qualification of the equity of the surety after an elaborate examination of the authorities and of the reasons which underlie it.—*Powell v. White*, 11 Leigh. 309; and it has been repudiated in all the States, except this State, North Carolina, and perhaps Vermont. In England, it has been materially modified, if not entirely abrogated by act of Parliament.—1 Lead. Eq. Cases, 132; Brandt on Suretyship, § 274. In this State, it is narrowed and circumscribed by the statute, which compels the creditor to assign to a surety paying the debt, any judgment the creditor may have obtained upon it, and authorizes the surety to assert "in law or equity any

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right or lien against the principal debtor, which the plaintiff could assert, if the debt had not been paid.”—Code of 1876, § 3418. This qualification of the equity of the surety, was never, perhaps, consistent with the spirit of our legislation, which favors sureties, and furnishes them peculiar remedies to compel the principal to the payment of the debt, and to compel the creditor to immediate suit, if danger of loss is apprehended from delay. Nor is it consistent with the liberal application of the doctrine of subrogation in other cases, when a creditor has an election of funds or remedies, which he is not permitted to exercise so as to disappoint the rights or equities to which others may be entitled.

In *Lyon v. Bolling*, 9 Ala. 463, an indorser, who had paid a separate judgment against himself, was held entitled to subrogation to a judgment the creditor had obtained against the maker for whose accommodation he had indorsed the promissory note; and execution on that judgment having been returned “no property found,” he could resort to equity to subject to its payment equitable assets, or property conveyed in fraud of creditors. In *Sanders v. Watson*, 14 Ala. 198, it was held that a surety discharging a joint judgment against himself and the principal, could not resort to equity to subject real estate the principal had fraudulently aliened. The court said: “The judgment recovered by the United States, was joint, against all, and the payment extinguished it.” The distinction between this case and that of *Lyon v. Bolling*, *supra*, is very narrow and technical. It is not in the relation of the parties, for it has long been the settled law of this State, that as between the maker and the indorser, an accommodation indorser stands to the maker in the relation of a surety.—*Brahan v. Ragland*, 3 Stew. 247; *Meek v. Black*, 4 Stew. & Port. 374. It is the technical effect of payment of the joint judgment, upon which the distinction rests. That the judgment was joint in the latter case, resulted from the election of the creditor, who, under our statutes, had the option of suing the principal and surety jointly or severally. The equity of the surety does not depend, nor can it be made to depend upon the mere option of the creditor in electing his remedies upon the debt. The judgments in *Lyon v. Bolling*, operated the same merger of the promissory note, that the judgment in favor of the United States did of the bond of the principal and sureties in *Sanders v. Watson*.—*Brown v. Foster*, 4 Ala. 282; *Sawyer v. Bradford*, 6 Ala. 282. As to the common creditor, the payment in each case had precisely the same operation, extinguishing each of the judgments so that he was without right to proceed upon them, or on the note or bond on which they

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were respectively founded. The independent judgment in his favor, though *functus officio* as to him, was yet deemed a security to which the surety could be subrogated. It was treated as a collateral security that did not *get back* to the principal debtor by the payment made by the surety. "What is a very payment at law, may not be payment at all in equity."—*Croft v. Moore*, 9 Watts, 451. Whether it shall have in equity the same effect as at law, depends upon the party making it, the circumstances under which it was made, and who claims the benefit of it. I confess that I am at a loss to understand upon what principle of equity, a principal bound morally and legally to protect his surety, or the fraudulent donee of the principal, could invoke the benefit and protection of a payment made by the surety, to disappoint and defeat the surety seeking the intervention of a court of equity to indemnify himself. If there are any cases in which a court of equity will not permit mere legal defences to be set up, (and it must be admitted there are many), it is difficult for me to conceive of one in which mere justice would more sternly demand a liberal exercise of the power, than in that of a surety under the circumstances disclosed in *Sanders v. Watson*. The case, however, is superseded by the statute to which we have referred; and without extending this opinion by a review of our decisions which may be supposed to recognize the doctrine of *Capis v. Middleton*, *supra*, it is enough to say we are not inclined to extend their application.—*Foster v. Trustees of Athenæum*, 3 Ala. 302; *Sanders v. Watson*, *supra*; *Houston v. Br. Bank*, 25 Ala. 250. They do not compel us to its application to a case of the kind now presented, in which subrogation is claimed to a security growing out of contract, not dependent upon a judgment against the principal. In no such case has subrogation been denied the surety, nor can it be denied, so long as courts of equity maintain the doctrine, that a creditor cannot, by his own election of the fund from which he will obtain satisfaction, prejudice the rights of others, but that if necessary they shall be substituted to his rights, or he shall be compelled to seek satisfaction from the fund to which they cannot resort. The statute subjecting the property of a tax collector to a lien for any default he may commit, the lien attaching on the execution of his official bond, is of the same dignity it would be, if in express words it was written as a stipulation of the bond. If so written, the bond would only repeat and declare its legal effect and operation. And if so written, in the absence of the statute, it would operate as an equitable mortgage, and as such a court of equity would enforce it. No right of property, neither a *jus in re*

[Elyton Land Co. v. Ayres.]

nor a *jus ad rem*, may be conferred, but on a sufficient consideration a charge on all the property of the collector is created, and the charge is a better or additional security for the satisfaction of his defaults. The statute creating it, third persons may have been induced by it to become his sureties, thereby subjecting, in the event of his default, their own property to a similar charge. To deny them the benefit of the *lien* upon a narrow construction that it is not intended so much as a security for the debt the default of the collector creates, as it is for the mere indemnity of the State and county, would add unnecessarily to the burthens of suretyship. The collector has no just cause of complaint that his property is made to bear the charge as well for the ease of his sureties, as for the indemnity of the State and county. Other creditors of his cannot reasonably complain that for their benefit the sureties are not compelled to relieve his property of the burthen. Purchasers from him are charged by law with notice of the *lien*, and can acquire no right or interest which is not subordinate to it.

A surety is not entitled to subrogation until payment of the debt for which he is liable.—Brandt on Suretyship, § 261; 2 Lead. Eq. Cases, 278. But whatever discharges the principal from liability to the common creditor, and is by him accepted as a payment, will operate in favor of the surety as a payment. It is not essential that the surety should have paid money; whatever the creditor accepts as an equivalent and in satisfaction will operate as a payment. The acceptance by the Commissioners' Court of the promissory notes of the sureties in satisfaction of the demand against the principal and sureties, was as effectual as a payment as if money had been employed.

We find no error in the decree of the Chancellor, and it is affirmed.

Elyton Land Co. v. Ayres.

Bill in Equity for Injunction.

1. *Injunction; when should not be granted.*—A tax-payer cannot, in the absence of some special equity, bringing his case within the recognized jurisdiction of a court of equity, obtain relief by injunction against a tax, State, county or municipal, because of its illegality.

APPEAL from Jefferson Chancery Court.
Heard before Hon. CHARLES TURNER.

(Elyton Land Co. v. Ayres.)

This was a bill filed by the appellant, the Elyton Land Company, against the appellee, Thomas B. Ayres, as tax collector of Jefferson county, and seeks to enjoin him from selling the property of the company, to pay certain taxes which it is alleged are illegal. From the pleadings and proof it appears that the appellant, a domestic corporation, located at Birmingham, owned during the year 1874 real property subject to taxation. This property was situated in and around Birmingham, in Jefferson county, and was returned to and assessed by the tax assessor of that county at \$127,000 00. Afterwards, the company was cited to appear before the board of equalization and show cause why said valuation should not be increased. The corporation appeared and introduced evidence showing that the property was assessed at a fair valuation, but the board, in the absence of any evidence to the contrary, ordered that the assessment of the corporation should be increased by the sum of \$44,888. The company paid the taxes on the property at the valuation made by the assessor, and the tax assessor reported the additional assessment as an error, to the court of county commissioners, but that court refused to allow it as such. The board of equalization was abolished March 19th, 1875. The tax collector of Jefferson county was proceeding to sell the property of the company to pay this additional assessment, when it filed this bill to enjoin him. On the hearing, the Chancellor dissolved the temporary injunction which had been granted on the filing of the bill and dismissed the bill as without equity, and the company bring the case here by appeal.

D. S. TROY, and GEO. F. MOORE, for appellant.

HEWITT & WALKER, *contra*.

BRICKELL, C. J.—The question decisive of this case has recently been fully considered in this court, and we must now regard it as settled. A tax-payer cannot, in the absence of some special equity, bringing his case within the recognized jurisdiction of a court of equity, obtain relief by injunction against a tax, State, county or municipal, because of its illegality.—Cooley on Taxation, 536; *Mayor, &c. v. Baldwin*, 57 Ala. 61; *Lott v. Gold Life Ins. Co.* 54 Ala. 499.

The decree of the Chancellor must be affirmed.

[Reynolds v. Harris.]

Reynolds v. Harris.

Unlawful Detainer.

1. *Justices of the peace; appeals from judgment of; how tried in Circuit Court.* On appeal from the judgment of a justice of the peace in unlawful detainer, the statute requires the case to be tried anew, without any regard to any defect in the proceedings before the justice, and the Circuit Court should not enquire into the regularity of the proceedings before the justice.

APPEAL from Macon Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an action of unlawful detainer, brought by the appellee, J. T. Harris, against the appellant, W. A. Reynolds, before a justice of the peace. Appellant moved before the justice to dismiss the proceedings, on the ground that there were no papers in the cause. Thereupon the plaintiff handed the justice a copy of a summons which had been served on the defendant by the plaintiff, acting as special constable, and asked the presiding magistrate to sign the same, which was done against the objections of defendant. It was admitted that the summons handed the defendant was the only paper issued. The justice overruled the motion, and the defendant excepted. The defendant then moved to quash the summons, which had been written out on the day of trial, because it was not any original summons or any substitute for a lost summons, but merely a copy of the paper served on the defendant. The court overruled this motion, and the defendant excepted. The defendant then moved to quash and set aside the service of the summons, because Harris, who was appointed special constable, and who executed the summons, was the party plaintiff. The justice overruled this motion, and the defendant excepted. The defendants then moved to quash the summons and proceedings on the ground that its issue was without any other than a mere verbal complaint made to the magistrate by the plaintiff. It was admitted that only a verbal complaint was made to the magistrate. The justice overruled the motion, and the defendant excepted. After these motions had been made and overruled, the plaintiff offered to file a written complaint. The defendant objected to the filing, or bringing into the cause any written complaint at the time it was offered, but the justice allowed the plaintiff to then file a written complaint, and defendant excepted.

[Ex parte Simmons.]

The defendant then refused to go into the trial or to plead to the merits, and the justice thereupon rendered judgment against him.

On appeal to the Circuit Court the bill of exceptions recites, that "by agreement of counsel said motions were renewed in the Circuit Court, as if the same had been formally written out and presented; the facts and grounds on which they are based were admitted by the plaintiff to exist." The Circuit Court ruled that "the facts on which the motions were based did not authorize it to quash them, and the court therefore overruled said motions," to which ruling the defendant excepted. There was a jury and verdict for the plaintiff, and the defendant brings the case here by appeal, assigning the refusal to grant his several motions as error.

W. C. BREWER, for appellant.

ABERCROMBIE, GRAHAM & BILBRO, *contra*.

BRICKELL, C. J.—On appeal from the judgment of a justice of the peace in a proceeding for unlawful detainer or forcible entry and detainer, the statute is express that "the cause must be tried anew without regard to any defect in the proceedings before the justice." A trial on the merits in the Circuit Court, as if the cause had been originally and regularly instituted in that court, the statute intends to secure. The proceedings before the justice were irregular, but into that irregularity the Circuit Court properly refused to enquire, or to entertain any motion based upon it.

Let the judgment be affirmed.

Ex parte Simmons.

Habeas Corpus.

1. *Habeas corpus; what not proper remedy for.*—*Habeas corpus* will not lie to correct errors or irregularities in the judgments of courts. The judgment must be void, not merely voidable; it must be a usurpation or excess of jurisdiction to entitle the prisoner to the writ.

2. *Sentence; what irregular, but not void.*—Although under § 4450 of the Code of 1876, a sentence on conviction for burglary, to hard labor for the county for a period exceeding two years is irregular, and would be reversed on appeal or writ of error, it is not void or a nullity, and does not entitle the prisoner to a discharge on *habeas corpus*.

[Ex parte Simmons.]

This was an application by the petitioner, Sam Simmons, for his discharge on *habeas corpus*. It appeared that the petitioner, at the spring term, 1879, of Marengo Circuit Court, was regularly tried upon an indictment for burglary, and the jury found the defendant "guilty as charged in the indictment." Upon this verdict, the court sentenced the petitioner to three years hard labor for Marengo county, and ordered the sheriff to deliver him to the hirer of convicts, one W. H. Grayson, in whose custody he was, when he applied to the probate judge for a discharge, on the ground that the sentence to hard labor for the county for a longer period of time than two years is illegal and void. The probate judge refused to discharge the petitioner, and he here renews his application for his discharge.

EUGENE McCAA, for petitioner.

BRICKELL, C. J.—It is not the office of a *habeas corpus* to obtain the correction of errors or irregularities in the judgments of courts of superior or inferior jurisdiction. An appeal, or a writ of error, is the only mode of redressing or obtaining relief from error or irregularity.—Code of 1876, §§ 4961–62. *Illegality*, as distinguished from mere irregularity, rendering the proceeding voidable only, not absolutely void, a usurpation, or excess of jurisdiction apparent on the face of the proceeding, will entitle a party restrained of his liberty to a writ of *habeas corpus*, and to discharge from imprisonment.—*Ex parte McKivett*, 55 Ala. 336.

The Circuit Court had jurisdiction of the indictment against the petitioner, and jurisdiction to proceed to a final trial. The statute defining the offense, declares the punishment shall be imprisonment in the penitentiary, or hard labor for the county, for not less than one nor more than twenty years.—Code of 1876, § 4343. The term of imprisonment, or of hard labor, it is the province of the court, not of the jury, to fix.—Code of 1876, §§ 4484–4506. Another section of the Code provides, that when the term of imprisonment, or of hard labor for the county exceeds two years, the sentence must be to imprisonment in the penitentiary.—Code of 1876, § 5450. With these statutes in force, it is obvious, it was a question the court had full jurisdiction to determine, and was bound to determine, whether they were inconsistent, and whether the later statute, § 4450, operated a repeal of so much of § 4343, as authorized the sentence of the petitioner to either imprisonment in the penitentiary, or to hard labor for the county, the term exceeding two years. Having jurisdiction to determine the question, it is also obvious that

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though the court may have erred in its determination, its judgment is merely voidable, not void. It is the want of power to hear and determine, or an excess of power which will render a judgment void, not error or irregularity in the exercise of the power.—Freeman on Judgments, § 135.

The sentence pronounced against the petitioner is erroneous, and if the cause was before us on error, it would be reversed and cause remanded, that sentence should be pronounced for his imprisonment in the penitentiary, instead of hard labor for the county. If the writ of *habeas corpus* was awarded, his discharge would be the only judgment which could be pronounced. That result could be reached only by an inquiry into the *legality*, or to speak more accurately, the *regularity* of the judgment of a court legally constituted—an inquiry forbidden by the statute.

The application of the petitioner is denied.

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Action on Injunction Bond.

1. *Evidence; what admissible.*—Though a party relying upon a former decree as an adjudication of the subject matter, must produce the whole record that the court may be able to construe the decree in the light of all the proceedings on which it is founded; yet, if the only point of inquiry is the existence of the decree, an exemplification of the decree alone is sufficient, without proof of the other proceedings.

2. *Reversal; what not ground for.*—Where parol testimony of the contents of a bill and answer is unnecessary or superfluous, its introduction, even if erroneous, will furnish no ground for reversal.

3. *Evidence; what admissible.*—When there are two causes between the same parties, it is permissible to show by parol in which of these causes a decree offered in evidence was rendered.

APPEAL from Barbour Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The appellee, James Olive, brought this action against the appellant, Harmon Adams, and the sureties on a bond given by him to secure an injunction in a cause then pending between them in the Chancery Court of Henry county. On the trial, he offered in evidence a certified copy of the decree of the Chancellor dissolving the injunction, which had been granted on the execution of the bond. The defendants objected to the introduction of this decree, on the ground that "it was only a fragment of the whole record of the Chancery Court of the case of *Harmon Adams v. James Olive*, in which

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said injunction bond had been executed, and because plaintiff did not offer the whole record in evidence." The court overruled this objection and allowed the decree to be read in evidence, and the defendants excepted. One Oates was then allowed to testify, against the objection and exception of defendants, that he and the Register in Chancery for Henry county had diligently searched for the papers in the register's office and could not find them. This witness further testified that he could not state all the contents of the lost papers in said chancery cause, but that he could state the substance of the bill and answer. This witness further stated that there was another case of the same name then pending in the Chancery Court; that the docket of said Chancery Court and the minutes thereof were neatly and correctly kept during the pendency of the chancery suits of *Adams v. Olive*, and that said docket and minutes were all in existence and then in the office of the Register in Chancery for Henry county. Said Oates then offered to prove by his oral evidence that the decree which had been admitted in evidence was rendered in the first mentioned cause of *Adams v. Olive*, and identified it orally as the decree dissolving the injunction, which had been rendered in the first mentioned suit, and that he knew that the decree introduced in evidence was rendered in the identical case in which the bond was given. The defendants objected to this evidence to identify the decree, because the docket and minutes of the Chancery Court were higher and better evidence of the facts proposed to be proven by the witness. The court overruled this objection, admitted the evidence, and the defendants excepted.

The rulings to which exceptions were reserved are now assigned as error.

JOHN A. FOSTER, and J. M. BUFORD, for appellants.—The decree should not have been admitted; it was but one part of the record in the case, and the whole record should have been introduced.—14 Ala. 404. The evidence of Oates as to the contents of the bill and answer was clearly inadmissible. Parol evidence of their contents could only be permitted after their loss had been properly shown. He was not the custodian of the papers, and the loss of a paper cannot be proved by another in the absence of the legal custodian, unless some good reason be shown for his absence.—8 Por. 529; 9 Ala. 391, 803; 11 Ala. 266; 28 Ala. 250. It was therefore not legally proved that the papers were lost, and in the absence of this proof it was error to admit parol evidence of their contents.—5 Ala. 435; 9 Ala. 662; 2 Ala. 58; 42 Ala. 589; 30 Ala. 113; 41 Ala. 419; Brick. Dig. § 712, page 853.

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The records which were not lost were sufficient to show in what case the decree was rendered. No excuse is shown for their absence, and to admit parol testimony on this point is to abrogate the salutary rule that the best evidence must be introduced to prove a fact.—See 30 Ala. 527; 8 Por. 529; 28 Ala. 250; 1 Greenl. Ev. § 84, and note.

W. C. OATES, *contra*.

BRICKELL, C. J.—The only objection made to the introduction of the exemplification of the decree of the Chancellor dissolving the injunction, was, that it was but a part of the record, or as it is expressed in the bill of exceptions, *a fragment of the whole record of the Chancery Court*. The only fact to be ascertained in the present case, was the existence of that decree. On its rendition, the condition of the bond was broken, subjecting the obligors to liability for such damages as any person had sustained by the wrongful suing out of the injunction.—Code of 1876, §§ 3869–71. A party relying upon a former decree, as an adjudication upon the subject matter, must produce the whole record of the proceedings, that the court may be able to construe the decree in the light of all the proceedings on which it is founded.—*Smith v. McGehee*, 14 Ala. 404; 1 Greenl. Ev. § 511. But when the only matter to be ascertained is the existence of the judgment or decree, an exemplification of it is of itself sufficient without proof of the other proceedings.—*Locke v. Winston*, 10 Ala. 849; 1 Greenl. Ev. § 511. The objection was therefore properly overruled.

The parol evidence of the contents of the bill and answer was unnecessary and superfluous, and its introduction, if erroneous, does not authorize a reversal.—*Fant v. Cathcart*, 8 Ala. 725; *Jemison v. Dearing*, 41 Ala. 283.

It was permissible to prove by parol the identity of the decree.—2 Whart. Ev. § 988.

Affirmed.

[Lindsey v. Veasy et als.]

Lindsey v. Veasy et als.

Bill in Equity to rescind Contract.

1. *Rescission ; what will not authorize.*—Misrepresentations by third persons, whose opinions the vendee sought as to the quality and quantity of land, are not available to procure a rescission, when they were not the agents of the vendor, or acting in his interest or at his request.

2. *Entry of land from United States ; what insufficient to secure title.*—Under the revised statutes of the United States, (§ 2289, Ed. 1875,) title to land entered at a reduced rate for a homestead, cannot vest until final certificate, after proof of occupation for the prescribed period, and non-alienation during that time. One who merely entered lands and paid entrance fees for a homestead, without residing thereon or cultivating it for the period prescribed, and during that time alienated it, could not acquire any title.

3. *Conveyance ; what will not pass title.*—A conveyance of lands held adversely at the time to the grantor, especially where he has been defeated in a suit to annul the deed under which the adverse claimant held, will not pass title to the grantee, and as to lands thus adversely held, there is a breach of covenants of seizin in the deed.

4. *Rescission ; what sufficient misrepresentation to authorize.*—Where the vendor makes material false representations as to his seizin and right to convey, which deceived the vendee, and induced him to purchase lands, it is immaterial when rescission is sought, whether the representations were knowingly or ignorantly made.

5. *Rescission ; what proper case for.*—V. and L. exchange lands, each conveying by warranty deeds to the other. V. lived in a different county from L., and had never seen his lands, but contracted in reliance upon L.'s statement of title and right to convey. Part of L.'s lands were held adversely to him under a deed which he had unsuccessfully sued to have canceled. Other portions had been sold under execution against him, and as to still another portion he had no title, having entered it as a homestead, and never complied with the conditions upon which he could obtain title. The result was, that V., if he obtained title to any of the land, got title to only sixty-five acres out of two hundred, which L.'s deed professed to convey. V., after remaining in possession about a year, abandoned L.'s land, and filed his bill for rescission. *Held*—V. had a plain case for such relief, L. being insolvent.

6. *Account ; what proper statement of.*—In taking an account of rents, after a decree rescinding a contract and conveyance of lands in exchange, where complainant, in pursuance of the contract, retained possession of part of the tract sold, and also another part contrary to its terms, respondent leasing and paying rent for the part retained under the contract, respondent should not be charged with the whole rental value of the premises for the year, but is entitled to have deducted from it the amount of rents paid by him, and the value of the occupation of that portion which complainant retained contrary to the terms of the exchange.

APPEAL from Pike Chancery Court.

Heard before Hon. H. AUSTILL.

The opinion states the facts.

JOHN D. GARDNER, for appellant.

PARKS & HUBBARD, contra.

[Lindsey v. Veasy et als.]

STONE, J.—The present controversy arose out of an exchange of lands. Lindsey conveyed to Veasy and his sisters two hundred acres of land in Jefferson county, for two hundred and eighty acres in Pike county, conveyed by Veasy and his sisters to Lindsey. Neither Veasy nor his sisters had ever seen the lands in Jefferson county prior to the purchase. Each conveyed by deed with warranty. Each party took possession under the purchase, but Veasy did not obtain possession of the entire lands purchased. At the end of a year, Veasy abandoned the possession of the lands conveyed to him and his sisters, and the present bill seeks a rescission of the contract. It charges fraud on Lindsey, first, in misrepresenting and overstating the quality, productiveness, and cultivable quantity of the Jefferson land; second, in representing that he had title to the land, when he had no title whatever to 135 of the 200 acres; and it charges that Lindsey was and is insolvent. The exchange of lands was made, and the deeds executed in the latter part of the year 1874. A great deal of testimony was taken, much of which, if properly objected to, would probably have been suppressed. No motion was made to suppress, and we must regard all the testimony as before us for what it is worth. On the question of Lindsey's solvency, the testimony for complainants tends to prove he had not sufficient property, above legal exemptions, to pay the value of the lands conveyed to him, while neither he, nor any of his witnesses, are interrogated, or answer as to his solvency, or ability to pay his debts. See act "to regulate property exempted from sale for the payment of debts," approved April 23d, 1873, Pamph. Acts, 64. If it were necessary to a decision of this case, we think we might infer the Chancellor came to the conclusion that Lindsey was insolvent; and there is not enough in the record to convince us the Chancellor erred in that conclusion.

As to representations of quantity, quality and productiveness of cultivable land in the tract conveyed by Lindsey, the averment is scarcely proved. Veasy certainly traded in blind confidence, and trusted to the representations of Knight and Wilson, who had seen the land, rather than to any thing said by Lindsey. We are convinced Veasy was deceived by the representations; but Veasy himself sought their opinions, and there is no evidence upon which we can hold Lindsey accountable for them. They are not shown to have been agents of his, nor acting at his request, nor in his interest. For aught that appears, they themselves only expressed their honest opinion.

The question of title. On one question, there is a noticeable incongruity in this record. Lindsey, in his answer,

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speaking of one eighty acre tract, south half of north-east quarter of section 36, conveyed by his deed, uses the following language: "Respondent admits that he entered a portion of the lands included in said trade, from the Government of the United States, for the use of an adjoining farm, for which he received a certificate of entry from the officer authorized by law to issue and grant the same. He did reside upon and use said lands for more than five years continuously before said trade was made, except at such times as he was temporarily absent, but always by and through agents and tenants. He avers that he turned over to the said John T. J. Veasy the certificate of entry, and is fully prepared and able and willing to perfect said title, when he can get his certificate so turned over by [to] John T. J. Veasy." Lindsey, in his testimony, states that pending the negotiation with Veasy, he informed him "that he (Lindsey) had entered 80 acres adjoining farm, and had paid up the entrance money, and had received from the land office what they called a duplicate, which witness would show said Veasy; that he had never gotten any patent for said 80 acres, but would give Veasy the duplicate, and that he might draw the patent on it when presented, provided the trade was made." Knight, witness for appellant, who was present during the negotiation, testified to the same thing in substance. The natural import of the language of these witnesses is, that Lindsey had, in the ordinary way, entered this 80 acres of land in the government land office, and had received the receiver's certificate of entry, issued in duplicate, certifying that he (Lindsey) had paid the government price for the land, which certificate, or duplicate, as it is frequently called, entitles the person to whom it is issued to a patent from the government of the United States, whenever the same is issued. This, without further payment, or further proof. It has long been settled in this court that a certificate of entry, such as we have described, is evidence of title which will support ejectment.—1 Brick. Dig. 626, § 28. The proof in this case by the land officers, and by many other witnesses, establishes beyond dispute that Lindsey had not entered the land, and had not received a duplicate certificate of entry. What Lindsey had in fact done, was an application under the homestead acts of congress to enter this land, at a very reduced price, for the purposes of a homestead, or adjacent farm.—See Rev. Stat. U. S., Ed. of 1875, § 2289, *et seq.* No final certificate had issued to him, and he was in no condition to demand a patent. Such final certificate could not be issued until the expiration of five years after application to enter, and then only on proof, by two witnesses, "that he,

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she or they, have resided upon or cultivated the same for five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated," &c. None of these steps had been taken, except the payment of the small sum demanded when the application for entry was first made. Lindsey had neither resided upon the land, nor improved or cultivated any part of it; and he alienated it. He thus put it out of his power to acquire a title to this eighty, and his covenant of seizin was broken the moment it was entered into.

There is irregular testimony, but not objected to on that account, that in a suit by appellant against the widow and heirs of James T. Lindsey, to vacate the deed to said James T., and to dispossess his widow and heirs at law, complainant failed of recovery. It is also proved that up to the time of his death, in 1873, James T. Lindsey remained in possession and control of the 55 acres deeded to him, claiming to be the owner thereof; and that his widow remained in control thereof, claiming under the deed to her deceased husband, when Lindsey sold and conveyed to Veasy. Under either of these conditions, Lindsey could not sell and convey a good title to said fifty-five acres, and as to this part of the tract, the covenant of seizin was broken.—*Bernstein v. Humes*, Dec. Term, 1877. And there is irregular evidence tending to show that the remaining 65 acres of the tract have been sold by the sheriff under execution. We do not hesitate to declare, that under the deed of Lindsey, the Veasys obtained a title to not exceeding sixty-five of the two hundred acres, if, indeed, they obtained a title to any part. We can not affirm whether Lindsey's false representation of seizure, and right to convey, was knowingly or ignorantly made. In the case of *Lanier v. Hill*, 25 Ala. 554, the bill charged that the misrepresentation, for which rescision was sought, was fraudulently made, and the proof probably did not go further than to show it was made by mistake. This court said, "we do not think this makes any difference. The misrepresentation is charged with particularity, and it is as clearly proved; and in this respect the *probata* and *allegata* correspond. The intent with which it was made is entirely immaterial, so that the allegation of fraud was superfluous. As the evidence as to the misrepresentation is full, and as it is equally clear the purchasers were deceived by it, and it went to the most material part of the contract, they have thus far made a case which would entitle them to a rescision of the contract." See, also, *Walton v. Bonham*, 24 Ala. 513; *Prout v. Roberts*, 32 Ala. 427; *Kelly v. Allen*, 34 Ala. 663, 669, and authorities

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cited. We think this record presents a clear case for rescission.

There was an error committed in taking the account. Under the contract of exchange, Veasy retained possession of part of the Pike plantation for the year 1876. This part, so retained, was called a one-horse farm. Subsequently, Lindsey rented this part from him at a rental of \$45. Part, or all of this rent, the testimony tends to show, was paid by Lindsey to Veasy; and it is also shown that the sisters of Veasy remained in, and occupied one of the houses, contrary to the terms of the exchange. One hundred dollars rental for that year is the highest value the testimony authorizes for the whole tract in its then condition. Many of the witnesses place it much below that price. There should have been deducted from the sum ascertained to be the value of the rent, the rental value, or amount paid by Lindsey as rent in 1875 for the said one-horse farm, and also the value of the use and occupation of the said house occupied by Veasy's sisters. We think \$50 rent for that year is all that should have been charged against Lindsey, under the circumstances. The Chancellor should have sustained appellant's exceptions to the charge of rent for 1875. We are not inclined to disturb the Register's finding as to the other two years; and we are not inclined to increase the allowance made to Lindsey for improvements.

In one other respect the Chancellor erred. The Register had ascertained that Lindsey had paid taxes on the land amounting to \$18.60. This the Chancellor decreed he was entitled to. The decree was pronounced December 8, 1877, and inasmuch as Lindsey would occupy the premises for the residue of the year, and until January 1st, 1878, the Chancellor set off this benefit that would accrue to Lindsey against his excess of claim for taxes paid, and made him no allowance therefor. Lindsey had already been charged, in the Register's account, with the rent of the premises for the entire year 1877, and should not have been charged a second time. The excess of taxes paid by Lindsey over the balance against him previously reported by the Register, is \$11.60; making, in the aggregate, \$61.60 charged against Lindsey, in excess of the true amount due. In re-stating the account, this must be corrected.

The Chancellor made an order, allowing the decree to be superseded by Lindsey, on his executing a bond with prescribed conditions; which order he complied with. We suppose he has remained in possession ever since. This will probably raise other questions, for the correct decision of

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which we have not sufficient information. We therefore remand the cause.

Reversed and remanded, to be proceeded in according to the principles of this opinion. Let the appellees pay the costs of this appeal.

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Bill in Equity to declare and enforce Trust.

1. *Lunacy; inquisition of; what void.*—An inquisition of lunacy had without personal notice to the alleged *non compos* is void, and so is the appointment by the Probate Court of a guardian for said lunatic, and the proceedings had by such guardian for a sale of lands belonging to said lunatic.

2. *Statute of limitation; what within protection of.*—The possession of lands under a conveyance of a guardian, made in pursuance of a void decree of the Probate Court for their sale, is supported by color of title and is adverse, protected by the statute of limitations.

Same; when begins to run.—Where the legal title to lands resides in trustees or a survivor of them, and such lands are sold by a guardian of the *cestui que trust*, under void proceedings, and the purchaser goes into possession, the statute of limitations begins to run from the date of such sale, and possession under it, and is not suspended by the death of the trustees, after such possession accrued.

3. *Cestui que trust; when barred.*—Where both the trustee and *cestui que trust* have been out of possession of lands, held adversely to them for the length of time necessary to perfect the bar of the statute of limitations, the *cestui que trust* will be barred, even though he was all the time under a disability, such as minority, coverture or insanity; and this principle applies as well to equitable as to legal interests of the *cestui que trust*.

4. *Limitations, statute of; to what applicable.*—A wider operation is given to the statute of limitations, when applied to adverse possessions, than when applied to contracts; the latter are not extinguished by it, but the remedies for their enforcement are barred, but as to property, a possession protected by the statute ripens into a perfect indefeasible title.

5. *State; when subject to statute of limitations.*—Where the State holds lands as a mere trustee, it is subject to the operation of the statute of limitations.

APPEAL from Elmore Chancery Court.

Heard before Hon. CHAS. TURNER.

The bill in this case was filed by the appellant, William P. Molton, by next friend, against the appellee, Green C. Henderson, and seeks to have certain lands, then in the possession of Henderson, declared subject to the trusts created by the will of Thomas Molton, the father of complainant, for his benefit. The facts may be thus stated: Thomas Molton owned the lands and died in 1845, leaving a last will and testatment, by which he devised the lands in question to "John Henly and Catherine Molton, and the survivor of

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them, upon the express trust and confidence that the said John Henly and Catherine Molton, or the survivor of them, shall apply the rents and profits of said land to the support and maintenance of my son, William Molton, during the term of his natural life, unless the said William Molton should be restored to his reason, sufficiently to transact the ordinary business of life, in which event it is my will and desire that the trust hereby created shall cease and determine, and that the said John Henly and Catherine Molton, or the survivor of them, shall convey said lands to the said William Molton. And in the event that the said William Molton should depart this life without being restored to reason, then it is my will that the said John Henly and Catherine Molton, or the survivor of them, shall convey the lands to my children, or such of them as may be living at the death of the said William Molton, to be equally divided between them. William Molton never became sane, and was, at the time of the filing of this bill, still *non compos*. On the 13th day of May, 1857, Thomas J. Molton, a brother of complainant, filed a petition in the Probate Court of Montgomery county, in which he alleged that he "was the brother of one William P. Molton, a male person of about thirty-one years of age, and who has resided, for the last ten or twelve years, in the town of Columbia, district of Richland, State of South Carolina, being an inmate of the Lunatic Asylum at that place. He further represents that he, the said William P. Molton, is *non compos mentis*, and that for the protection of the said William P. Molton, in the county and State aforesaid, it is necessary a guardian should be appointed by the proper tribunal for him. Upon this petition, and without personal notice to William P. Molton, the Judge of Probate made an order, requiring the sheriff to summon a jury to try the question of the sanity of said William P., and at the same time appointed Charles H. Molton guardian *ad litem* to represent him. The hearing of the petition was continued until the 5th day of June, 1857, on which day the court made an order declaring William P. a *non compos* and appointing Thomas J. Molton his guardian, who soon after qualified as such. On the 5th day of September, 1857, Thomas J. Molton, as guardian, filed his petition, praying a sale of the lands, as beneficial to the interests of said *non compos*, and on the 28th day of October, 1857, the court granted an order of sale, under which, on the 5th day of January, 1859, the land was offered for sale, and purchased by Marshall H. Molton. A deed to Marshall H. was made on the 29th day of March, 1859, in accordance with an order reciting payment of the purchase-money. The land then

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passed by successive transfers from Marshall H. to the defendant, Green C. Henderson. John Henly, one of the trustees named in the will, died in 1853, and Catherine Molton, the surviving trustee, died in August, 1872. The bill in this case was filed on the 14th day of September, 1874. The Chancellor granted the relief prayed, declared the lands still subject to the trust created by the will of Thomas Molton, and allowed the defendant the value of permanent improvements made, provided they did not exceed the value of the rents which he held defendant liable to pay. Both parties appeal to this court, the appellant assigning the allowance of the value of the improvement, and the appellee the decree declaring the lands subject to the trust created by the will of Thomas Molton.

ELMORE & GUNTER, and WADE KEYES, for Molton.—While it is well settled, that if a trustee delay the assertion of his rights until the statute effects a bar against him, the *cestui que trust* will also be barred; it must be accepted with this qualification, if the *cestui que trust* is *sui juris*. If the *cestui que trust* is under a disability the statute will not begin to run until the disability is removed.—*House v. Mullen*, 22 Wall. 42; *Perry on Trusts*, § 860. The case of *Bacon v. Gray*, 23 Miss. 140, is very persuasive of this doctrine. In the great case of *Marquis Cholmondeley v. Lord Clinton*, 2 Jacobs & Walkers, 1, which is considered as having established the general rule, that when a trustee is barred the *cestui que trust* is barred also, the exception in favor of a *cestui que trust* under disability is expressly recognized. This case and its doctrines are approved and cited by Chief Justice MARSHALL in *Elmendorf v. Taylor*, 10 Wheat. 174.—See, also, case of *Griswold v. Butler*, 3 Conn. 233. None of the cases cited in *Bryan v. Weems*, 29 Ala. 428, militate against this construction of the statute.—See, especially, the case of *Freeman v. Perry*, 2 Dev. 243, and *Falls v. Torrence*, 4 Hawk's Law and Eq. 412; *Perry on Trusts*, 489, § 860; *Thompson v. Simpson*, 1 Dr. & War. 489; 18 Beav. 239; 3 De-Gex. F. & J. 58; 54 Penn. St. 472. See, also, Ang. on Lim. § 473; *Smilie v. Biffle*, 2 Penn. St. 52. Henderson does not claim paramount to the trust. The law holds him to notice of his claim of title, and if he purchases a trust estate with notice of the trust, he cannot plead the statute.—2 Dev. 243; 3 How. 33. And the statute will, in no case, run against one innocently ignorant of his rights, nor against one incompetent to enforce them.—2 Wash. Real Prop. 184. The order declaring William P. Molton *non compos* and appointing a guardian for him, was a nullity, and a deed made by such

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guardian is void, and will not constitute color of title.—33 Cal. 668; 1 Cow. 276; 5 Cow. 346; 8 Cow. 583; 12 John. 365; 9 Wend. 511; see, also, eighth section of Judge Brickell's brief in *Horton v. Sledge*, 29 Ala.

RICE, JONES & WILEY, for Henderson.—This is really an equitable action of ejectment.—37 Ala. 598; 46 Ala. 696, and is to be governed by its analogy to the action of ejectment.—2 Ala. 563; R. C. § 3381. When the trustee is barred the *cestui que trust* is also barred.—Story Con. Laws, § 576; *Harrison v. Heflin*, 54 Ala. It is an unvarying rule that the statute of limitations begins to run whenever there is some one to sue and somebody liable to be sued.—2 Brick. 220, and cases cited. It is also a general rule that when the statute commences to run, no intervening disability will suspend it. 30 Ala. 61. The statute of limitations, when applied to adverse possession of property, real or personal, operates directly on the title, and when the bar is perfect the adverse possessor has an indefeasible right or title.—13 Ala. 641; 18 Ala. 248. In this case, adverse possession commenced before April, 1859, and continued up to the filing of the bill in 1874. Catherine Molton was, in life, capable of suing, and Marshall H. was liable to be sued from the moment he made the purchase, and the statute began to run from that moment, and long before this suit was brought had vested the complete title in Henderson, and the bill should have been dismissed.

BRICKELL, C. J.—The case is before the court on an assignment of errors by the appellant, and a cross assignment by the appellee. The latter are addressed to the equity of the bill, and, if well taken, are fatal to the appellant's right of relief, and a consideration of the former is unnecessary.

1. The legal estate in the lands in controversy, was devised to John Henly and Catherine Molton, or the survivor of them, in trust, for the use and benefit of the appellant, William P., during his natural life; but if, at any time, he should be restored to reason, the trustees were required to convey the lands to him. If he was not restored to reason, on his death the trustees were required to convey them to such of certain children of the testator as should be living at that time. The bill negatives the happening of the contingency on which the trustees were authorized to convey the legal estate to the appellant. It is manifest the estate of the trustees was intended to be co-extensive with the power and duty they were required to perform, and that it would, if the

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appellant did not become sane, survive his beneficial interest, or equitable estate.—*Comby v. McMichael*, 19 Ala. 747.

2. The inquisition of lunacy had in the Court of Probate against the appellant, without notice to him of its pendency, under the authority of *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. LePetre*, 21 Ala. 504, is void. From its want of validity, necessarily results the invalidity of the appointment of Thomas J. Molton as guardian of the appellant, and of the proceedings had in the Court of Probate for the sale of the lands in controversy.

3. These proceedings may be void, yet a possession under a conveyance made by the guardian, in conformity to the decree of the Court of Probate, for the sale of the lands, is supported by color of title, and is adverse, protected by the statute of limitations.—*Dillingham v. Brown*, 38 Ala. 311; *Saltmarsh v. Crommelin*, 24 Ala. 352; *Riggs v. Fuller*, 54 Ala. 141; *Pillow v. Roberts*, 9 How. U. S. 477.

4. The sale by the guardian was made in January, 1859. The deed to the purchaser, acknowledging the payment of the purchase-money, was executed on the 29th day of March, 1859. The purchaser, Marshall H. Molton, entered into possession immediately after the sale, and he and those claiming under him, by mesne conveyances, remained in open, peaceable possession, claiming the absolute title from thence to the filing of the present bill, on the 4th September, 1874. The surviving trustee, Catherine Molton, was in life until August, 1872. This possession, hostile to the legal estate, furnished her a cause of action for the recovery of the lands, from its commencement in 1859; and from its commencement the bar of the statute of limitations must be computed. The adverse possession was continuous, privity of estate and title existing between Marshall H. Molton, the original possessor, and each subsequent possessor.—*Riggs v. Fuller*, *supra*. The death of the surviving trustee did not suspend or arrest the operation of the statute of limitations.—*Reed v. Mirrell*, 30 Ala. 61; Code of 1876, § 3248. The statute of limitations is as applicable to suits in equity, as to suits at law.—Code of 1876, § 3758.

5. The equity of the bill is thus resolved into a single question; the trustee not having sued within the statutory period, is the *cestui que trust* barred? In the case of *Lewellen v. Mackworth*, 3 Eq. Cases Ab. 579, Lord HARDWICKE said: "The rule that the statute of limitations does not bar a trust estate holds only between the *cestui que trust* and trustee, not as between *cestui que trust* and trustee on one side, and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of conse-

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quence without such trust, and so the act would never take place. Therefore, when the *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both." In *Horenden v. Lord Annesley*, 2 Sch. & Lef. 628, it was said by Lord REDESDALE, "If the trustee does not enter, and the *cestui que trust* does not compel him to enter, as to the person claiming paramount, the *cestui que trust* is barred." These authorities were cited with approbation in *Colburn v. Broughton*, 9 Ala. 363. In *Bryan v. Weems*, 29 Ala. 428, this court say: "The rule is certainly well settled that if a trustee delay the assertion of his rights, until the statute effects a bar against him, the *cestui que trust* will also be barred." This case is cited, and distinctly recognized as authoritative in the subsequent case of *Fleming v. Gilmer*, 35 Ala. 66.

This is conceded to be the general rule, but it is argued that it should be taken subject to the exceptions contained in the statute of limitations, and as the *cestui que trust* was continuously *non compos mentis*, the rule cannot be applied. The proposition is not new, and though authorities may be found which sanction it, we are not prepared to follow them. The reason of the rule, the principles of public policy in which it has its foundation, and the weight of authority, English and American, forbid engrafting upon it such an exception. The reason of the rule is, that the trust exists only as between trustee and *cestui que trust*; as to strangers, the legal and equitable estate are one; and a bar of the legal comprehends a bar of the equitable estate. In *Wyck v. East India Company*, 3 P. W. 310, Lord TALBOT said: "The administrator, during the infancy of the plaintiff, had a right to sue; and though the *cestui que trust* was an infant, yet he must be bound by the trustee not suing in time; for I cannot take away the benefit of the statute of limitations from the company, who are in no default, and are entitled to take advantage thereof as well as private persons, since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant." A different opinion, it seems to have been supposed, was expressed by Sir JOSEPH ICKYLL. In *Pentland v. Stokes*, 2 B. & N. 75, Lord MENNERS, speaking of that opinion, said: "The opinion of Sir J. ICKYLL, if it intended to apply to third persons, which I do not conceive it was, has often been denied, and is contrary to many decisions. If the trustees, who are so appointed, neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the statute of limitations is a bar to the *cestui que trust*." Of this case, it must be observed that the *cestui que trust*, during a

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part of the time, necessary to the bar of the statute, was an infant. The American authorities assert the same doctrine in the best considered cases, as we think. In the case of *Smilie v. Biffle*, 2 Penn. St. 52, the *cestui que trust* was under the disability of coverture. The character of the disability is not material. It may be infancy, coverture, non-residence, or mental incapacity. Whatever it may be, it must be an exception expressed in the statute of limitations. If it is not one of these exceptions, the courts cannot add it as an exception to those which the statute has enumerated. Nor can one exception be allowed a larger operation than another, because its subject may be more pitiable, and may appeal more strongly to our sympathies. In the case to which we have referred, the court, after declaring the rule that where *cestui que trust* and trustee are both out of possession, for the time limited, the party in possession has a good bar against both, say: "Indeed, the wonder is that so plain a proposition should ever have been doubted. A party obtains an inceptive title, by an adverse holding, subject to be defeated only by the entry of the legal estate at any time within twenty-one years"—that being the statutory bar in Pennsylvania. "And the trustee may be compelled by the *cestui que trust* to enter, so as to avoid the adverse possession; and the *cestui que trust* may himself enter as a defeasor." Reciting the particular facts of the case, and declaring the title of the purchaser was manifestly defective, the court continue: "But Nicholson took possession of the premises in pursuance of the contract, and held the same for twenty-one years. He, therefore, held adversely to both *cestui que trust* and trustee, and consequently obtained by the statute of limitations, an indefeasible title, which cannot now be disturbed or gainsaid. The statute of limitations is emphatically a statute of repose." And in conclusion it is said: "When the act commences running, it continues to run, as is well settled. It would strike me to be an anomaly, that the owner of the legal estate should be barred, and that the owner of the equitable title, whether his interest be an interest in possession, or by way of remainder, should nevertheless be entitled to enter. Equity follows the law, and courts of equity have adopted the act of limitations by analogy." The rule is recognized in *Williams v. Otey*, 8 Humph. 563; *Wo-bridge v. Planters Bank*, 1 Sneed, 297; *Long v. Cason*, 4 Rich. Eq. 60, in which the *cestuis que trust* labored under the disability of infancy; and in *Herndon v. Pratt*, 6 Jones' Eq., in which the disability was coverture. In this last case, the court concisely express the rule and its reasons: "For statutes of limitation and statutes giving

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title by adverse possession, would be of little or no effect, if their operation did not extend to *cestuis que trust* as well as trustees who hold the title for them, and whose duty it is to protect their rights. If, by reason of neglect on the part of the trustees, *cestuis que trust* lose the trust fund, their remedy is against the trustees, and if they are irresponsible it is the misfortune of the *cestuis que trust*, growing out of the want of forethought on the part of the maker of the trust, under whom they claim."

The statute of limitations has in its application to adverse possessions of property, real or personal, a very different and wider operation than when applied to contracts. Contracts are not extinguished by its operation—remedies for their enforcement are barred, the obligation of the contract remaining unimpaired. But as to property, a possession protected by the statute, ripens into a perfect, indefeasible title, which cannot be gainsaid.—*Bohannon v. Chapman*, 13 Ala. 611. The statute as to contracts must be pleaded to be available as a defense; but as to possessions, it may be given in evidence under the general issue. It would be a strange anomaly, if the statute would clothe the adverse possessor with the legal estate, which he acquires, and holds, and asserts in hostility to the equitable estate, and yet subject the legal estate to be defeated by that equitable estate. As to equitable estates, the statute would be shorn of all strength, and they would remain a cloud on the alienation of the legal estate, narrowing the sphere of the operation of the statute of limitations, and subjecting the possessor to the perils of injury, from the sense of security a long and open possession naturally begets, and which the law intends to inspire and encourage. On principle and authority, therefore, we must say the fact the appellee was *non compos mentis*, and yet so remains, cannot prevent the operation of the general rule to which we have referred. If his trustees have been negligent in asserting the legal title, the law affords him remedies against them, which are without the operation of the statute. These remedies, if he has been wronged, he must pursue.

But it is urged that the decisions, to which we have referred, were made when the statute of limitations was not expressly applicable to courts of equity; and as our statute now declares that it is as applicable to suits in equity, as to suits at law, when applied to suits in equity, the application must be with the exceptions in favor of *non compos mentis*, infants, &c. Whatever may have been the doubts elsewhere as to the application of the statute to suits in equity, in this State, the rule prior to the statute was well settled. In all

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cases of concurrent jurisdiction, the statute was as obligatory on courts of equity as of law. Though the statutes did not expressly apply to equitable demands, yet in a court of equity, they were applied by analogy. In either case, the exceptions of infancy, &c., were recognized and given effect to by courts of equity.—1 Brick. Dig. 698, §§ 852-54. The present statute is, as are many of the sections of the Code, merely affirmatory and declaratory of the law as it had been settled by judicial decision. It cannot and was not intended to remove from the bar of the statute the equity of a *cestui que trust* to pursue a stranger to the trust when the legal estate is barred, the bar comprehending, as it must, the equitable estate, unless the unity of the estate is destroyed.

It is lastly insisted, the legal estate escheated on the death of the surviving trustee, and that the statute could not thereafter run against the State. No discussion of this question would be profitable. If there was an escheat, it was of the naked legal estate, and when it devolved on the State, thereby the State became merely a trustee. The equitable estate of the appellee did not escheat, nor did the estate in remainder.—Lewin on Trusts, 289-93. When the State holds as a mere trustee, it is subject to the statute of limitations.—*Milner v. The State*, 38 Ala. 600.

We are constrained, therefore, to declare the statute of limitations protects the possession of the appellee, Henderson, and is a positive bar to the relief sought by the bill. This renders unnecessary a consideration of the assignments of error relating to the exceptions of the Register's report. The result is, on the cross-assignment of errors, the decree of the Chancellor must be reversed, and a decree here rendered dismissing the bill at the cost of Robert H. Molton, the next friend of the appellant, William P. Molton, in this court, and in the Court of Chancery. On the assignments of error by the appellant, the decree must be affirmed.

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Indictment for Grand Larceny.

1. *Evidence; what admissible.*—No unerring or certain general rule can be laid down, governing every case, as to when collateral and extrinsic facts become relevant and material testimony, as shedding light on the motive or intent with which a criminal act was done; and while care must be exercised not to open too wide a field for extrinsic exploration, yet collateral or outside facts, tend-

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ing naturally to elucidate the act or intent charged, and pointing directly to the question in controversy, not merely furnishing material for comparison, are admissible.

2. *Same; what not admissible.*—On the trial of an indictment for larceny of a horse, the taking of which, clandestinely in the night time, was not denied by the defendant, who did not inform the owner afterwards, the issue being only as to the *intent* of the taking, whether felonious, or under an honest belief that he had a license from the owner to use the horse in escaping from revenue officers,—evidence that the owner knew defendant had been engaged in illicit distilling, and on one occasion had found a keg of whiskey under his steps, which had been put there the night before, and “from some things which had occurred between them before, he supposed the defendant had put it there,” is inadmissible, though proposed in connection with evidence showing “intimate personal and social relations between them, and that defendant had furnished whiskey to the prosecutor, which he knew had been made by defendant, in violation of the United States revenue law, before the horse disappeared, and that the prosecutor had told defendant that he might have his horse, at any time, to escape or avoid being arrested for violations of the revenue laws of the United States.”

3. *Same.*—Nor is evidence admissible, that some time before the taking of the horse, the revenue officers had sought to arrest defendant while at work in a field, and fired upon him as he fled, and at other times had threatened to kill him; or that on one occasion he had attempted to flee the country, but forbore to attempt it, for fear of being arrested on the railroad train—there being no evidence that at the time of the taking of the horse, the defendant was in such danger of arrest as to prevent his then notifying the owner of the horse, or afterwards informing him of the taking.

4. *Same.*—Where two separate and distinct conversations take place between the prisoner and the witness, proof by the State of one of the conversations, will not authorize the defendant to prove the other conversation.

5. *Reversal; what not ground for.*—While it is not usual for courts to interfere and rule out evidence which counsel is willing to let in, yet if the evidence is irrelevant or immaterial, the court may rule it out of its own motion, and its ruling furnishes no ground for reversal.

6. *Charge; what proper.*—In charging the jury, the court may state the testimony which witnesses have deposed to, and should, in proper cases, lay down the rules by which the jury is to be guided in weighing it; and may explain controverted questions raised on the trial, and inform the jury on whom the burden of proof rests in each aspect of the case; but in doing this, it should be careful not to give any undue prominence to any phase of fact which the testimony tends to establish; leaving the jury, when there is legal evidence bearing on the question, to determine its weight, under appropriate instructions.

7. *Charge; when not ground for reversal.*—Where a charge asked, isolates certain enumerated facts or circumstances, and invokes instructions of the court on them, as circumstances specially to be weighed in the cause, the court, if it gives the charge, should accompany it with a fair and candid statement of any facts and circumstances pointing in an opposite direction; but the mere fact that a charge given has a tendency to mislead, is not ground for reversal; additional explanatory charges should be asked.

8. *Charge; what properly refused.*—A charge that the defendant could not be convicted for larceny of a horse, if he had the honest belief, at the time of the taking, that he had authority from the owner of the horse to take and use him, to avoid arrest by revenue officials, is properly refused, where there is evidence of a clandestine taking by defendant in the night time, without any attempt then or afterwards to notify the owner, and no evidence that he was pursued or in danger of arrest at the time of the taking. Such a charge ignores the inquiry whether the horse was taken, under such authority, to avoid arrest, and renders the defendant guiltless if he had such belief, though the defendant did not choose to avail himself of such license, but feloniously took the horse to convert it to his own use.

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APPEAL from Clay Circuit Court.

Tried before Hon. JOHN HENDERSON.

The appellant, Green Durrett, was indicted for the larceny of a horse belonging to one James Hardy.

Hardy testified that his horse disappeared from his horse lot on the night of the 16th day of July, 1877; that the fence was down at the back of the lot, and the horse had been taken out and carried off through the woods, or along a dim path; that, by printed notices, he offered a reward of one hundred and twenty-five dollars for the horse and thief, and that about eight or ten days afterwards the horse was delivered to him by T. A. Walls, at Montevallo, distant about seventy-five miles from the place where the horse disappeared.

The evidence of this witness, on cross-examination, tended to show that the defendant had, prior to the alleged larceny, been engaged in illicit distilling; that witness knew this fact and had occasionally visited the defendant, and had received whiskey from him. This witness further stated, on cross-examination, that "a short time before the alleged larceny, and early one morning, he found a keg of whiskey under the door steps of his store, which had been put there the night before, and that from some things that had occurred between the witness and defendant he supposed that the defendant had put it there. The State objected to this evidence and moved the court to exclude it. Before the State acted on this motion, counsel for defendant stated that other evidence would be offered, in connection with this answer of the witness, showing intimate social and personal relations between the witness and defendant, and that defendant furnished whiskey to witness, which he knew had been made by the defendant in violation of the laws of the United States, before his horse had disappeared, and that the witness had told the defendant that he might take his horse at any time, to escape or avoid being arrested for a violation of the revenue laws of the United States." The court then excluded the evidence concerning the keg of whiskey, and the defendant excepted.

T. A. Walls was then examined as a witness for the State, and testified that, in July, 1877, he saw a printed notice signed by Hardy, stating that a horse had been stolen from him, and offering a reward for the recovery of the horse and the capture of the thief, and that in company with one Shortridge he arrested the defendant, on the 22d of July, 1877, near Montevallo, while he was riding the horse which was afterwards delivered to Hardy. "At the time of the arrest the defendant stated that the horse was his, and that he had owned him a year or two. This witness further testified

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that the arrest was made about a mile from Montevallo, and that when they started off, Shortridge and the defendant rode ahead of witness some distance, so far that witness could not hear what passed between them; that when they had gone about a half mile defendant and Shortridge stopped and witness came up to them; this was about a half hour after the statement by the defendant that the horse was his. Defendant's counsel then asked the witness if the defendant did not then state that the horse belonged to Hardy, who had given his consent for the defendant to take him and get out of the way of the United States revenue officers." The State objected to this question, the court sustained the objection, and the defendant excepted.

One Humphries, a witness for the defendant, was then asked, "whether or not the defendant had carried whiskey to Hardy's store, or let him have whiskey at any other place." Witness replied, that on one occasion he knew of defendant's leaving a keg of whiskey under the door steps of Hardy's store. The State objected to this evidence, the objection was sustained, and the defendant excepted. This witness further testified that on one occasion, in February, 1877, he had heard Hardy say, at the house of the defendant and in the presence of several others (naming them), "that if he was riding along the road and a friend of his was likely to be arrested for illicit distilling, that he would get down off his horse, and let the friend have him to get off on, and that a friend desiring to get away from the United States revenue officers was welcome to any thing he had to aid his escape."

Defendant then offered to prove, by one John Caldwell, that, a short time before the alleged taking of the horse, witness and defendant were working in a field near defendant's house, when one Dallas Smith, a revenue officer, and an armed posse, passed in the public road near by; that when defendant saw them he said they were after him, but that they would not catch him, and at the same time ran towards the woods; that Smith and his posse commenced shooting at defendant, and shot at him until he reached the woods and was out of sight. The State objected to this evidence; and before the court passed on this objection, counsel stated that the evidence was offered in connection with other evidence, showing that the revenue officers of the United States, about the time above stated, had threatened to kill the defendant; that these threats were communicated to him; that he became greatly alarmed and laid out in the woods; and that during that time he had made an unsuccessful attempt to leave the country by railroad. The court then sustained the objection, and defendant excepted. The

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defendant then proposed to show, by one Ligon, that Smith and his posse had threatened to kill defendant, and that witness had communicated these threats to the defendant, just before the alleged stealing of Hardy's horse. The court sustained an objection by the State to this testimony, and the defendant excepted. The defendant then offered to prove, by the same witness, that when the threats above mentioned were communicated to the defendant he ceased to stay at home and laid out in the woods, saying that he was afraid of being killed by the persons who had threatened him. The court sustained an objection to this evidence, and the defendant reserved an exception.

It was admitted by the State that two absent witnesses (Humphries and Striplin) for the defendant, would, if present, testify that "about ten days before the arrest of defendant he went to Oxford, in Calhoun county, Alabama, and on his arrival there informed Humphries that he was going off, to avoid being arrested for illicit distilling; that the government officers were pursuing him and he had gone to Oxford to go off on the railroad; that Humphries then informed the defendant that a man by the name of Frank was then in Oxford, and that if defendant took the train, Frank would notify the government officials by telegraph that defendant was on the train, and if he went up or down the railroad he would be arrested; that defendant left Oxford, and when about leaving told Humphries he would return home." The State objected to the introduction of this evidence, and pending the argument on its admissibility the prosecuting counsel announced that he would withdraw all objection to it. The court then announced that it would, of its own motion, exclude this testimony, and did so exclude it, and the defendant excepted.

Counsel for the defendant having, in their argument to the jury, alluded to, and commented on the evidence of said Humphries, the counsel who made the closing argument for the State also alluded to and commented on such testimony. The court did not interrupt either of the counsel when allusion was made to the testimony of said Humphries. In the charge to the jury, in stating the evidence, the court "referred to the evidence of said Humphries, calling his name as a witness as being before the jury." The defendant excepted to the action of the court in permitting counsel for the prosecution to refer to and comment upon the evidence of said Humphries; and also, separately, to the action of the court in referring to the evidence of said Humphries. After these exceptions were taken, the court stated that the exclusion of the testimony of said Humphries had escaped the mind of

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the court, and said to the jury that they should not regard the argument of counsel or the charge of the court as to the evidence of the said Humphries.

The court then charged the jury of its own motion, "That it made no difference how often Mr. Hardy told the defendant to take the horse to escape from revenue officers; if Durrett took the horse with a felonious intent to convert the horse to his own use, and it was in Clay county, and before the finding of the indictment, he is guilty." To this charge the defendant also excepted. The court, of its own motion, further charged the jury, "That human nature is frail, and the law allows you to look to the interest and feelings that each witness may have in the event of this prosecution. It is said by the State that the witness Humphries is the brother-in-law of the defendant, and it is said by the counsel for the defendant that Mr. Hardy may be prosecuted, in his turn, for instigating a malicious prosecution. Mr. Hardy is not marked on the indictment as prosecutor, and there is no evidence that he is such." To this charge the defendant excepted. The court also charged the jury as follows: "It is insisted by the defendant that he took the horse to escape from the revenue officers. If you believe, from the evidence, that previous to the time of taking the horse the defendant was in Oxford, a railroad town eighteen miles away, and had an opportunity to leave the country unmolested, but failed to do so, and returned to his home, you may look to this fact, in connection with the other evidence, in determining whether he took the horse to convert it to his own use." To this charge the defendant excepted. The court, at the request of the State, gave the jury the following charges: 1. If the jury believe, from the evidence, that three or four weeks before the alleged larceny the revenue officers were in search of Durrett, and that Durrett then did not take Hardy's horse to escape on, they may consider the fact in determining whether or not the defendant, when he did take the horse (if the proof shows beyond a reasonable doubt that he did take him,) took him for the purpose of escaping, or to feloniously convert him to his own use. 2. If the jury believe, from the evidence, that there were no revenue officers in the neighborhood in which the defendant resided, in July, 1877, they can consider that fact in determining whether or not he was fleeing from arrest by such officers. 3. If the jury believe, from the evidence, beyond all reasonable doubt, that the defendant carried Hardy's horse a distance of seventy-five miles and kept it for six days without in any manner informing or attempting to inform Hardy of his taking the horse, then they can look to that fact in determining

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whether or not he, the defendant, thought he had a right to take the horse. 4. Even if the defendant thought he had permission to take the horse, still, if he feloniously took and carried him away with the intention of converting him to his own use, and they believe this beyond all reasonable doubt, from the evidence, then he is guilty." The defendant excepted to the giving of these charges, separately, as the same were given, and requested the court to give the following written charge: "If the jury have a reasonable doubt, under the evidence, whether or not the defendant honestly believed, at the identical time at which the horse was taken, that he had authority from the owner of the horse to take and use the horse to avoid arrest, then the jury should find the defendant not guilty." The court refused this charge, and the defendant duly excepted.

The jury found the defendant guilty as charged, and he was sentenced to four years imprisonment in the penitentiary. From this judgment and sentence, he appeals to this court, assigning as error the rulings of the court in the admission of evidence, and the charges given and refused.

JOHN T. HEFLIN, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—Crime is usually composed of act and intent. Hence, collateral and extrinsic facts sometimes become relevant and material testimony, as shedding light on the motive or intent with which the alleged criminal act was done. But care must be exercised not to open too wide a field for extrinsic exploration. To let in collateral or outside facts, the court must be able to perceive that they tend naturally to elucidate the act or intent charged. Their bearing must point directly to the *question* in controversy. It is not enough that they furnish material for comparison. To throw open inquiry to this extent would lead to all the evils which result from a multiplication of issues. The attention of the jury should be confined to pertinent and material issues, and no testimony should be allowed which does not appear to shed some light on these. No arbitrary rule, however, can be laid down which will furnish an unerring guide in every conceivable case. Each case must depend, in large degree, on its own attendant facts and circumstances.—1 Brick. Dig. 505, § 823 *et seq.*

In the present case, there seems to have been no denial that Hardy's horse was taken and carried away by the defendant Durrett. The real controversy was, whether the

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taking was felonious, or under a belief that the defendant had the owner's permission to take the horse. The testimony in the record tends to show that the horse was taken in the night time, clandestinely, and no attempt is shown to have been made to prove that the defendant notified the owner that he would take or had taken his horse. Nor is there any evidence tending to show that the prisoner had any intention of returning the horse, or of placing him where the owner could obtain him. The defense attempted to be set up was, that Hardy had given him license to take his horse, that he might escape the revenue officers. A noticeable weakness in this defense is, that if Durrett honestly believed he had or could obtain Hardy's permission to thus use his horse, no excuse is offered why he did not then make personal application to him for the privilege. It is not shown that he was then so pressed by pursuing revenue officers as to have no time to make his wishes known, and thus relieve himself of all imputation of the crime of larceny. These reflections, however, only tend to show the nature of outside evidence that would have been pertinent on the disputed question of intent.

We are not able to perceive what relevancy the friendly relations between Hardy and Durrett, and their whiskey transactions, had to the offense with which Durrett was charged. Neither can we perceive the materiality of the alleged attempt by revenue officers to arrest Durrett—their threats to shoot him, nor his abandoned intention to leave the country by railroad, taking the train at Oxford. These are too remote to furnish any just ground for conclusions affecting the guilt or innocence of the accused. The court did not err in ruling out the second conversation held by the prisoner with the witness Wall. There is nothing in the record tending to show that all took place in one continuous conversation. If such was the case, Shortridge could have proved it. He does not appear to have been examined. As they appear in this record, the conversations were separate and distinct, and proof of one by the State did not authorize the defendant to introduce the other as part and parcel of one continuous conversation.—1 Brick. Dig. 510-11, §§ 875, 881, 883, 884, 889.

It is not usual for courts to interfere and rule out evidence which counsel are willing to let in. Still, if the testimony be immaterial or irrelevant, as the evidence in this case was, such ruling is not an error which would work a reversal. In charging the jury, it should be the aim of the court not to give undue prominence to any phase of fact which the testimony tends to establish. If there be apparent incomplete-

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ness, or weakness of proof, on any of the controverted issues in the cause, counsel will usually dwell on this in argument. When there is any legal evidence bearing on the question, its sufficiency or insufficiency becomes a sole question for the jury, under appropriate rules of law, to be laid down by the court. The court may state the testimony which witnesses have deposed to, and should, in a proper case, lay down rules by which the jury is to be guided in weighing it. So, it would not be improper for the court to state and explain to the jury the controverted questions raised on the trial, and to inform them on whom the burden of proof rests in each aspect of the case. This, fairly and impartially done, greatly simplifies the investigation before an average jury. But when parties ask a charge which isolates certain enumerated facts or circumstances, real or supposed, and invoke the instruction of the court on these, as circumstances specially to be weighed in the cause, the usual result is to give such facts and circumstances great, if not undue, prominence before the jury; and, if given, the charge should be accompanied with a fair and candid statement of any facts and circumstances which point in the opposite direction. Less than this is apt to leave on the minds of the jury an impression that the convictions of the presiding judge incline in favor of the party such instructions are supposed to benefit. And the supposed bias is none the less potent and apparent, even though in giving such charge the court adds, these circumstances are to be considered with the other evidence in the cause. We have indulged in these reflections for the purpose of giving our sanction to a rule. The court, in the trial of causes, sits in severe impartiality, and is solicitous only to declare in clear and non-partizan terms, the rules of law by which the jury should be governed. This done, all responsibility is shifted from his shoulders and lodged elsewhere. The jury, under our system, is a necessary functionary of the court, intrusted with very large powers for weal or woe; and, in the performance of this high commission, they can not overestimate the duty they owe to the country, to their solemn oaths—yea, to God himself. If their verdict be not what its name imports, an expression of their legal convictions, as produced on their minds, under the rules of law given them in charge, then they are guilty of perjury, whether the effect of their verdict is to convict or acquit.

But charges, such as we have commented on above, furnish no ground for reversal, merely because of their tendency to mislead. Their mischief may be countervailed by explanatory charges asked; or, as we have seen, by a fuller enumer-

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ation by the court, of its own motion, of leading facts and circumstances pointing in each direction. This will repel all imputation of bias in the mind of the court and leave the responsibility where the law has placed it, on the conscience of the jury.

We do not find any error in the charge of the court. All the enumerated circumstances in the several charges given, were such as the jury should have considered in their deliberations. If their tendency was to give those circumstances prominence, this is not enough to secure a reversal. Explanatory charges might have been asked. The vice of the charge asked for defendant and refused, lies in the fact that it bases the right of acquittal on the honest belief of defendant, at the time at which the horse was taken, that he had authority from the owner of the horse to take and use him to avoid arrest. This ignores the important inquiry whether he took the horse to avoid arrest and under such authority. He might have had such authority, or conceived he had, and yet he may have chosen not to avail himself of that license, but in fact took the horse feloniously, for the purpose of converting him to his own use. For the same reasons the court did not err in giving the affirmative charges, which assert the converse of the proposition contained in the charge asked and refused. The error into which the Circuit Court fell, in commenting on testimony that had been ruled out, was promptly redressed when its attention was called to it. This furnishes no ground of reversal.

The judgment of the Circuit Court is affirmed.

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Bill in Equity to foreclose Mortgage.

1. *Mortgage, validity of.*—As between the parties to it, whatever might be its effect as to third persons, it is not essential to the validity of a mortgage taken to secure a pre-existing debt and future advances also, that it should express on its face that it is to operate not only as a security for a present debt, but also for advances; nor that the agreement that it should have such effect should be in writing.

2. *Note; what sufficient consideration for.*—Where a note is given for an aggregate sum, including not only a pre-existing debt, but the amount it was contemplated the mortgagee would advance before the maturity of the note, there is not as to such future advances, or the sum intended to cover them, any want of consideration for the note, and a mortgage given for its security is a valid security for so much as the mortgagee advanced.

3. *Homestead; what valid mortgage of.*—Prior to the enactment of a statute,

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prescribing any particular mode in which the wife's concurrence in a mortgage of the homestead should be expressed, if a wife joined with her husband in executing the conveyance, and it was acknowledged before and certified by a proper officer, the constitutional requisition of the voluntary signature and assent of the wife was satisfied.

4. *Laws of sister State; how must be pleaded to entitle party to defense claimed under.*—Where a right or defense is claimed in our courts, under a statute of a sister State, the party relying on it must set out the law by appropriate pleading, that the court may determine whether the right claimed falls within it. A mere statement by the pleader of the substance of the statute, or the duty or right of parties under it, the statute itself not being set out or proved, will not suffice.

APPEAL from Russell Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill filed by the appellees, Preer, Ilges & Co., against the appellants, Robert A. Forsyth and wife, and seeks a foreclosure of a certain mortgage on their homestead. The material facts are as follows: On the 18th day of April, 1871, the appellant, Robert A. Forsyth, was indebted to the appellees for supplies previously furnished him to the amount of about six hundred and fifty dollars, and wishing to obtain advances in the future, he and his wife executed their promissory note, payable to the appellees on the 1st day of November, in that year, for the sum of two thousand dollars, and on the same day, to secure the same, they executed a mortgage on certain lots in the town of Girard, Ala., alleged to constitute their homestead. This mortgage was duly acknowledged by Forsyth and wife soon after its execution, in the form necessary to pass title to lands, and duly recorded within the time prescribed by the statute. Under this agreement, advances were made by the appellees to an amount exceeding the face of the note, none of which had been paid when the bill was filed. Sworn answers were required, and both defendants answered under oath, admitting an indebtedness of the husband to the amount of six hundred and fifty dollars, which is averred to be the only consideration for the note and mortgage, which is alleged to be void as to future advances. The answers also set up, that the consideration of the note and mortgage was goods sold in Columbus, Ga., by weight and measure, and "that by the State laws of Georgia the appellees were compelled to apply to the ordinary of the county of Muscogee and have their weights and measures inspected and tested, and in default thereof they are not allowed, and are prohibited from collecting any account, note or other writing, the consideration of which is any commodity sold by their weight or measure, by the laws of the State of Georgia." The answers then aver a failure by the appellees to have their weights and measures tested, and set up this failure as invalidating

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the note and mortgage. There was some evidence tending to support this allegation of the answer; but the Georgia law or statute was not given in evidence.

The Chancellor decreed the note and mortgage a valid security for future advances, and ordered an account to be taken of the amount due the appellees, decreeing a sale of the mortgaged premises to pay the amount due. From this decree Forsyth and wife appeal to this court.

J. M. RUSSELL, for appellants.

ULYSSES LEWIS, and JOHNSON & INGRAM, *contra*.

BRICKELL, C. J.—1. Mortgages or instruments may be taken as a security for a present debt, or against contingent liabilities, or to cover future advances or responsibilities, when such is the agreement and intention of the parties. Many questions may arise when the rights of subsequent mortgagees or encumbrancers, or of judgment creditors, or of purchasers without notice are involved, which would affect the security and operation of the mortgage, when made as a security for future advances or responsibilities, which will not diminish its security or lessen its operation, when, as in the present case, the controversy is between the mortgagor and mortgagee. As between them it certainly is not essential to the validity of the mortgage, that on its face it should be expressed that it is to operate as a security not only for a present debt, but also for future advances; nor is it necessary that the agreement that such may be its operation should be in writing. When, as in the present case, a note is given for an aggregate sum, which embraces not only the pre-existing debt, but a sum intended to cover future advances, it is contemplated the mortgagee will make before the maturity of the note, there is not, as to the future advances, or the sum intended to cover them, any want of consideration for the note, and a mortgage given for its security is a valid security for so much as is advanced by the mortgagee.—1 Jones' Mort. §§ 364, 378.

2. When the mortgage was executed, there was no statute prescribing any particular mode in which the wife's concurrence in any alienation or mortgage of the homestead should be expressed. If she joined with her husband in executing the conveyance, and it was acknowledged before and certified by a proper officer, the constitutional requisition of her voluntary signature and assent was satisfied. She could impeach the validity of the conveyance by proof of fraud or duress practiced on her inducing its execution, but its valid-

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ity is not affected because she was influenced by the mere persuasion of the husband.—*Bailey v. Litten*, 52 Ala. 282; *Miller v. Marx*, 55 Ala. 322. The mortgage to the appellees, if the lands embrace the homestead of the mortgagor, a question it is not necessary to consider, is a valid and operative conveyance, and the Court of Chancery did not err in disallowing the claim of exemption.

The general rule of pleading in equity, and at common law is, that when a party claims a right, whether as ground of relief, or as a matter of defense, under a foreign law, he must, by appropriate pleading, set out the law, so that the court can see the right claimed falls within it.—*Cockrell v. Gurley*, 26 Ala. 405; *Gunn v. Howell*, 27 Ala. 663; *Crubbedge, Hazlehurst & Co. v. Napier*, MSS. If the statute of Georgia would affect the validity of the note and mortgage, it is pleaded too generally to be available to the appellants.

Let the decree be affirmed.

Smith v. Gayle.

Trespass Vi et Armis.

1. *Plea; what insufficient.*—A., H. and S. jointly commit a trespass on lands forming the homestead of the former owner, at that time held by the widow by virtue of her dower and quarantine rights, and oust the widow, who brings an action for such trespass. Subsequently she files a bill in chancery against H. and A. for dower and quarantine in said lands, and in such suit recovers judgment against them for about four thousand dollars. In consideration of three thousand dollars, the widow releases H. from all liability for the trespass, reserving in said release the right to enforce the balance of the decree against Armstrong, who pays it: *Heid*—That these facts constitute no bar to her action for the trespass and ouster against S., when her complaint contains no claim for rents and profits of the land; and a plea setting up these facts in bar is bad on demurrer.

APPEAL from Bullock Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

This was an action of trespass, commenced by the appellee, Amaranth L. Gayle, against the appellants, James Q. Smith and Thomas W. Armstrong, for a trespass upon and an ouster of appellee from certain lands in Lowndes county, Alabama. The complaint originally claimed damages for rents and profits of the lands mentioned, but was amended by striking therefrom all claim for such rents and profits. The defendants separately pleaded the general issue, and also a special plea, setting up "that the trespass and griev-

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ances mentioned in the complaint were committed, if at all, by these defendants jointly with one John W. Harper, and that the ouster and trespass mentioned in the complaint whereby the said plaintiff was deprived of the rents, incomes and profits of said premises, was one and the same act and trespass, and not several trespasses, and that after the commission of said trespass, the plaintiff elected to sue the said John W. Harper and the defendant, Thomas W. Armstrong, in the Chancery Court of Lowndes county for a part of her damages caused by said trespass and ouster, and now claimed in the complaint in this cause, to-wit: for the rents, incomes and profits of said premises for all the time from the date of said trespass to the hearing of said cause, and that the plaintiff in said cause recovered a large sum, to-wit, the sum of four thousand dollars, for and on account of said rents and profits, and that said recovery has been paid since the commencement of this suit by the said John W. Harper and Thomas W. Armstrong." A demurrer to this plea was sustained. There was also a special plea averring the joint commission of the trespass by Harper and the defendants, and setting up that since the commission of the trespass the plaintiff, "for and in consideration of three thousand dollars to her in hand paid by the said John W. Harper, released and discharged the said Harper from all liability whatever to her for said trespass. and reserved in such release and discharge only the right to assert and recover in any proceedings at law or otherwise from said defendant, Thomas W. Armstrong, the difference between said sum of three thousand dollars and the amount of the decree, which the plea then averred had been since paid by Armstrong. The release to Harper is made an exhibit to the plea, and after releasing Harper from all liability on account of the trespass, contains the following clause: "It is expressly understood and agreed, as part of this agreement, that nothing herein contained is intended to operate so as to prevent the said Amaranth L. Gayle from asserting or recovering in any suit or proceedings at law or otherwise from said Armstrong the difference between said sum of three thousand dollars and the amount of said judgment recovered by her against said Harper, this settlement being intended to operate for the benefit of and as a complete discharge of said John W. Harper, and not for the benefit of any other person or persons." A demurrer to this plea was also sustained.

On the trial, the plaintiff introduced testimony showing that she was the widow of Matt. Gayle, who died seized and possessed of the lands described in the complaint, which constituted his residence and the plantation adjoining there-

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to at the time of his death ; that the plaintiff continued in possession of the premises from the death of said Gayle up to the time of the trespass and ouster mentioned in the complaint, and that up to that time no dower had been assigned to her. There was evidence tending to show that shortly after the death of her husband, James Q. Smith, as attorney for John W. Harper, had commenced a suit against tenants upon said lands for their recovery ; that no suit against the plaintiff for possession had been commenced ; that judgment was recovered against said tenants who were sued, and a writ of possession was placed in the hands of the marshal, who, under instructions from Smith as attorney for Harper, took possession of the premises, including the dwelling in which plaintiff was then residing, and delivered the same to the defendant, Armstrong, as the agent of said Harper, and who was present aiding and assisting the marshal in the ouster, and it appeared in evidence that the foregoing trespass and ouster was the one for which the defendants were sued in this cause. The defendant then offered to prove by competent evidence for that purpose, that after the commencement of this suit, the plaintiff had instituted a suit in the Chancery Court of Lowndes county, against Harper and Armstrong, for dower in said lands, and for rents and profits of her dower and quarantine interest in said lands, and in said chancery suit had recovered a judgment for over four thousand dollars on account of her dower and quarantine rights in said lands, and that afterwards, in consideration of three thousand dollars paid by Harper, the plaintiff had released him from all liability for or on account of said trespass, and that since the last continuance Armstrong had paid the balance due on said judgment. At the time of offering to make proof of the foregoing facts, the defendants stated to the court that the object of the evidence was to show that by reason of said release to Harper, and said payment by Armstrong, that the plaintiff could no longer maintain this action for damages. The court refused to permit such proof to be made, and defendants excepted. There was a verdict in favor of defendant, Armstrong, and one in favor of plaintiff as against Smith for fifteen hundred dollars. Smith appeals, assigning as error the rulings on the pleas and the refusal to admit the testimony offered.

GUNTER & BLAKEY, and RICE, JONES & WILEY, for appellants.

WATTS & SONS, and D. S. TROY, *contra*.
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BRICKELL, C. J.—The rulings of the court on the demurrers to the pleas, and in the rejection of evidence, present the same questions—the operation and effect of the release given Harper by the appellee, and of the subsequent payment by Armstrong of the balance of the decree of the Court of Chancery for rents and profits during his occupancy of the premises, before the assignment of dower to the appellee. When the case was before this court at a former term, it was decided the release to Harper did not operate as a bar to the action. Its effect was partial satisfaction only of the damages claimed; and the only right the appellant could assert, was an application of the sum paid by Harper, in extinguishment of the damages incurred by the detention of the premises from the appellee. This effect was accorded to it by the appellee, by striking from her complaint all claim for rents and profits, converting the action into a demand of damages for the tortious entry upon the premises and her expulsion, in which Harper is not shown to have participated.

The subsequent payment by Armstrong was in compromise or settlement of his liability on the decree of the Court of Chancery for rents and profits, which were not an element of the damages claimed by the appellee in her amended complaint; and she had reserved her right to proceed against the appellant for damages for the wrongful entry upon and her expulsion from the premises. The payment was received in *part satisfaction* only, not in *entire satisfaction*. The intention of the parties would be defeated if it was allowed to operate as *entire satisfaction*, and it has long been the rule of courts to keep releases of causes of action, and satisfaction of them, within the terms of the agreement of parties, giving them no other effect than that which they intended.—*Burke v. Noble*, 48 Penn. 168. There is no error in the rulings of the Circuit Court, and the judgment is affirmed.

STONE, J., not sitting.

[Mitchell, Adm'r, v. Spence et al.]

Mitchell, Adm'r, v. Spence et al.*Bill in Equity to cancel Deed.*

1. *Will construed.*—Testator gave personalty and devised certain lands to his wife. The will directed, “as soon after death as my executor shall deem expedient, he shall sell all the balance of my property,” real and personal, “either at public or private sale, and on a credit or for cash, at his discretion,” and that the proceeds should be divided equally between testator's wife and children. By the will R., a brother of testator, was appointed executor of the will and guardian of the children, and it further provided, in event R. should die before testator's death, B. should be executor. *Held*—1. This was simply a devise or direction to the executor to sell property not specially devised, and not a devise to them with directions to sell, and did not intercept the descent to the heirs. 2. The power was not a naked power of sale within the meaning of the statute (Code, § 2218) which passes to the successor in the trust, but a *discretionary power*, resting in the personal confidence reposed in the executor, constituting a personal trust, which could not pass to an administrator with the will annexed. 3. Where the purchaser of lands is in possession, claiming under a void conveyance showing its own invalidity, equity will not take jurisdiction to declare the sale void, and to cancel the conveyance made in execution of it, but will leave the owner to his remedy at law.

APPEAL from Chambers Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by the appellant, John W. Mitchell, as the administrator *de bonis non, cum testamento annexo* of the estate of James S. Mitchell, deceased, against Samuel Spence, former administrator, with the will annexed, of said estate, and against William C. Darden, as the person in possession of certain lands which had formerly belonged to said estate.

The testator, James S. Mitchell, died in Chambers county, Ala., on the 18th day of September, 1858, leaving a last will and testament, which was, on the 26th day of October following, duly admitted to probate. By this will he gave certain specified property to his wife, after which it provided, in a succeeding clause: “I desire that as soon after my death as my executor shall deem expedient, he, the said executor hereinafter named, shall sell all the balance of my property, both real and personal, either at public or private sale, and on credit or for cash, at his discretion, and the proceeds of such sale shall be equally divided between my wife, above named, and my children, Mary E., Louisa Jane, John W., and Cornelia Mitchell, that is, after the payment of debts due and costs of administration.” The third clause of the will appoints “Robert Mitchell guardian of my above

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named children, and also appoint him executor of this my last will and testament;" and the fourth clause is as follows: "In the event that the said Robert Mitchell, my brother, should die before my death, then I nominate and appoint James T. Brock executor of this, my last will and testament." The executors in the will refusing to qualify, the appellee, Samuel Spence, was, on the 27th day of October, 1858, appointed administrator, with the will annexed, and qualified and took possession of the estate. On the 31st day of January, 1859, Spence, professing to act under the power contained in the will, sold to one Tilmon, a large tract of land belonging to the estate, under which sale Tilmon was placed in possession of the land, which he subsequently sold to Darden. Spence, as administrator, in compliance with directions from Tilmon, deeded the lands to Darden, who is now in possession of the same.

The bill averred these facts, and prayed that the Chancellor would declare such sale to be void, and order that the conveyance by Spence as administrator of Darden be delivered up and canceled, and for general relief. On final hearing the Chancellor dismissed the bill, and taxed appellant with the costs. From this decree Mitchell appeals and assigns the same as error.

W. H. DENSON, and WATTS & WATTS, for appellant.—The power of sale conferred by the will on the executors named therein, was a personal trust, and under section 1609 of the Revised Code, the administrator Spence had no authority to exercise such power. It was never contemplated by said section to shift a trust reposed by the testator from the persons in which he reposed it, and place it in the power of any one who happened to be administrator of his estate. There can be no fair presumption of a confidence reposed in such person by the testator, and no rule of public policy or natural justice authorizes the execution of such a power, as the one contained in the will in this case, by any other person than the one on whom the will expressly confers such power. There can be no doubt that the testator reposed great confidence in the integrity and probity of the persons named as executors by him. He leaves to their discretion the interests of those who were nearest and dearest to him, and provides that if the executor first named shall die, that then the other shall act. That this will creates a personal trust, see *Anderson, Adm'r, v. McGowan*, 42 Ala. 280; *Tiffany on Trusts*, 209; *Story's Eq.* §§ 1068, 1068a, 1068b; 41 Ala. 649; 2 John. Chan. 21; 5 How. (U. S.) 268-9; 10 Peters, 563. The sale by Spence was void, and a court of equity will so declare it,

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and order a cancellation of the deed, which is valid on its face and constitutes a cloud upon the title to the land.—39 Ala. 722; 11 Ala. 295; 12 Ala. 734.

BARNES & HOLMES, *contra*.—The power in the will is a mere naked power, and does not create a trust.—26 Ala. 426; 45 Ala. 426. If the power in the will is a mere naked power, the administrator, with the will annexed, had the authority to execute it.—R. C. § 1609. If he had the power to sell, and did sell, then the sale was valid. But if the language of the will did not create a mere naked power, but was a devise to the executor to sell, even then the administrator with the will annexed had the authority to sell.—R. C. § 1609; *Anderson v. McGowan*, 45 Ala. 462. Such a sale was valid; and the bill contains no equity.

BRICKELL, C. J.—The statute, which it is supposed, conferred on the administrator with the will annexed, the power to sell and convey the lands in controversy, reads as follows: "Where lands are devised to several executors, or naked power given them by will to sell, the survivor or survivors, and the acting executor or executors, when any one or more of them resigns, or refuses to act, or is removed by a court of competent authority, and also an administrator with the will annexed, has the same interest in, and power over such lands, for the purpose of making sale thereof, as the executors named in such will might have had."—Code of 1876, § 2218. The words of the statute are plain—it is only when there is a devise of lands to executors to sell, or a naked power of sale conferred on them, that an administrator with the will annexed, succeeds to the devise or to the power. The distinction between a devise to executors to sell, and a naked power to sell, is well known to the common law, and is very concisely and accurately stated in *Patton v. Crow*, 26 Ala. 431. A devise to executors by name, with directions to sell, intercepted the descent to the heir, passing the freehold to the donees, coupling an interest with the power. A mere devise that executors should sell, did not intercept the descent to the heir, passed no estate to the executors, and was a naked power. On these two devises the statute operates.

There is no devise of the lands or gift of the personal property to the executors found in the will of the testator. There is simply a devise—a direction that the executor should sell all the estate, real and personal, not specifically devised and bequeathed by the first item or clause of the will. If it is a naked power of sale, the administrator with

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the will annexed succeeded to it; but if it is founded in the personal confidence reposed by the testator in the executor, the statute does not intend its delegation or transmission to another.—*Anderson v. McGowan*, 42 Ala. 285; *Tarver v. Haines*, 55 Ala. 503. The distinction between a *naked power of sale*, on which the statute operates, and a *discretionary power*, resting in personal confidence reposed in the executor, not within the operation of the statute, is fully discussed in the authorities referred to, and it would be useless repetition to renew the discussion.

We cannot doubt the power of sale conferred on the executor is of the latter class. The sale is to be made so soon after the death of the testator as the executor, his brother, shall deem it expedient; and is to be made publicly or privately, for cash or on credit, at his discretion. The executor is also appointed guardian of the testator's children, among whom and their mother, the proceeds of sale are to be divided. In the event of the death of the executor in the life of the testator, another executor is nominated. The time of the sale is committed to the judgment of the executor—when he shall deem it *expedient, fit and proper, under all the circumstances*, the sale must be made; but it can only be made after an exercise of his judgment. The mode of sale—whether it shall be public or private—and whether it shall be for cash, or on credit, rest also in his discretion. The relationship of the executor to the testator, the appointment of the executor as guardian of the testator's children, the terms of the devise, and the nomination of an executor to execute the trusts of the will, if the one should die in the life time of the testator, indicate clearly that the power sprung from the confidence reposed by the testator, and is a trust personal to the executors named. He had confidence that either of them would make a sale, only when it was fit and proper the sale should be made—to their judgment and integrity he committed the time, mode and terms of sale. If the power had been naked—if it was simply to sell and convey, to it the administrator with the will annexed would have succeeded. But the sale and its terms depend on the exercise of judgment and of discretion by the executors, and the power is not, therefore, transmitted by the statute.

The sale made by the administrator is consequently void, not conferring any title on the purchaser. A court of equity will not take jurisdiction to declare such a sale void, and cancel the conveyance made in execution of it. The remedy at law for the recovery of the lands, if held by the purchaser, is adequate. The conveyance discloses its own invalidity,

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and can cast no cloud on the real title.—*Posey v. Conway*, 10 Ala. 855.

The decree of the Chancellor dismissing the bill must be affirmed.

Russell v. Gregory, Adm'r.

Attachment.

1. *Attachment; when cannot be maintained.*—If a vendor, who contracts to deliver cotton at a future day, certain, receives payment of the price, and before the day appointed disables himself from complying with his contract, the purchaser may treat the contract as rescinded, and sue presently for the money paid out; and an attachment on such a debt would not be premature, though commenced before the time fixed for the delivery of the cotton; but where there is no proof of a breach of the contract, other than the failure to deliver, on the appointed day, an attachment sued out before that time is prematurely brought and cannot be maintained.

APPEAL from Barbour Circuit Court.

Tried before Hon. HENRY D. CLAYTON.

The appellant, W. M. Russell, sued out an attachment against Burrell Bottoms, the intestate of the appellee, Thomas J. Gregory, on the 18th day of November, 1865. The affidavit for the attachment averred that Burrell Bottoms was justly indebted to appellant in the sum of six hundred dollars, as damages for the breach of two contracts, as follows: On the 21st day of January, 1865, Russell purchased of said Bottoms five thousand pounds of cotton seed, for which he paid him the sum of six hundred and fifty dollars; and on the 21st day of January, 1865, Bottoms, in consideration of the payment of said sum, executed and delivered to Russell his written agreement, acknowledging the payment of that sum, and obligating him to deliver the cotton at any time before the 25th day of December, 1865. Bottoms had not delivered the cotton, which had been demanded by Russell, and had fraudulently disposed of the cotton. The affidavit further averred, that on the 26th day of January, 1864, Bottoms sold to Russell fifty-two hundred and fifty pounds of seed cotton for the sum of five hundred and twenty dollars, in consideration of which Bottoms executed a written agreement, acknowledging the payment of the money and obligating himself to deliver the cotton by the 25th day of December, 1864. The affidavit then averred the delivery of part of the cotton, and a failure on demand to

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deliver the balance, and a fraudulent disposition of the cotton. On the trial the plaintiff introduced the written agreements in writing, showed the value of the cotton, and proved that the intestate of appellee had often, in his life-time, admitted the correctness of the plaintiff's demand. This was all the evidence in the case, and the court, at the request of the defendant, charged the jury that "if they believed all the evidence in this case, the plaintiff cannot recover." To this charge the plaintiff excepted, and judgment being rendered for the defendant, he brings the case here by appeal, assigning the charge given as error.

D. M. SEALS, and JOHN A. FOSTER, for appellant.

JERE N. WILLIAMS, and FERN M. WOOD, *contra*.

BRICKELL, C. J.—When this cause was before this court at a former term, (*Ex parte Bottoms*, 46 Ala. 312), it was held, the affidavits disclosing that the vendor had disabled himself from a delivery of the cotton according to the terms of the contract of sale, the vendee had the right to treat the contract as rescinded, and sue presently for the money he had paid. Consequently the attachment, though issuing before the day appointed for the delivery of the cotton, was not premature.

On the final trial in the Circuit Court, the plaintiff offered no evidence tending to show that the vendee had, before the issue of the attachment, by a sale or other disposition of the cotton, disabled himself from keeping his contract. If there was a breach of the contract, it occurred subsequent to the commencement of the suit, by the failure to deliver the cotton at the time appointed. Facts not occurring until after the commencement of suit, essential to a plaintiff's right of recovery, will not support the action.—*Donaldson v. Waters*, 30 Ala. 175.

The judgment is affirmed.

[Johnson v. Parkinson et al.]

Johnson v. Parkinson et al.*Bill in Equity for Relief against Fraudulently altered Note, &c.*

1. *Bill; what multifarious.*—A bill which seeks relief against a note made by complainant, and fraudulently altered without his consent, in material particulars, joining with parties interested or concerned in the note, other defendants who have no connection or interest in the matter, is multifarious; so, also, is a bill by a tenant in common of a mill, seeking an account of rents and profits from his co-tenants, who had exclusive use and possession, and joining as defendants with his co-tenants, persons who have no interest in or connection with the claim.

APPEAL from Lee County Chancery Court.

Heard before Hon. N. S. GRAHAM.

The appellant, William H. Johnson, filed this bill against the appellees, J. C. Parkinson, Edward Parkinson, E. M. Barnes, S. P. Adams, C. M. Worthington, and William Neighbors. From the bill it appears that the appellant and Edward Parkinson bought of J. C. Parkinson a mill, on the 1st day of April, 1872, and went into possession. They executed to J. C. Parkinson two promissory notes, one for five hundred dollars, due six months from date, and the other due twelve months after date, for the sum of one thousand dollars. It is averred that by the fraud of Edward and J. C. Parkinson, and without the knowledge or consent of appellant, these notes, after being signed, were altered so as to make them bear interest. Subsequently the appellant made various payments on these notes without finding out that they had been altered. These payments extinguished the first note. After the discovery of the alteration of the notes by Johnson, on the 2d of January, 1873, he and Edward Parkinson sold two-thirds of the mill to William M. Robertson and James O. Perry, receiving six hundred dollars in cash and a note for the same amount, due six months from date, secured by a mortgage on the interest sold, which contained a power of sale in case of default. At the same time Edward Parkinson sold his interest to Johnson. The mill was soon after removed to Tallapoosa county. During the year 1873, Johnson paid to J. C. Parkinson six hundred and eighty-five dollars, to be credited on the thousand dollar note.

Robertson and Perry failed to pay their note of six hundred dollars, and their interest in the mill was sold under the

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mortgage, Robertson becoming the purchaser, paying sufficient to take up the notes. Shortly after the removal of the mill to Tallapoosa county, E. M. Barnes became the confidential friend of Johnson, and was entrusted with the settlement of his matters with J. C. Parkinson, who claimed interest on the two notes made to him while Johnson resisted the claim. On the 31st of January, 1874, Barnes, as attorney for Johnson and J. C. Parkinson, had a settlement, and at the same time he also settled with Robertson for Johnson. In his settlement with Parkinson, Barnes fraudulently and contrary to his directions from Johnson, allowed interest on the note, which left a balance due Parkinson of five hundred and twenty-nine dollars. Upon the settlement with Robertson it was found that he was indebted to Johnson in the sum of six hundred and forty-three dollars.

Barnes then took from Robertson two promissory notes, each for three hundred and twenty-two dollars, payable one day after date, one payable to J. C. Parkinson and the other to himself. And at the same time Robertson executed his mortgage to secure the payment of these notes. Edward Parkinson had made a note to Johnson for three hundred and fifty dollars, which was likewise placed in Barnes' hands by Johnson. By a fraudulent combination to cheat and defraud Johnson, Barnes and J. C. Parkinson caused the note of Edward Parkinson to be credited with two hundred and six dollars, the alleged balance due to J. C. Parkinson, who thereupon delivered the one thousand dollar note made by Johnson and Edward Parkinson to Barnes, who delivered it to Johnson. J. C. Parkinson did not receive the note of Robertson from Barnes, but left the same with him as his agent. J. C. Parkinson, after this, promised to meet Johnson but failed.

Barnes, before the 24th day of June, 1874, under the mortgage by Robertson to secure his two notes, sold the mill and bid it in for himself at the price of nine hundred and sixty dollars, but failed to pay his bid. In August, 1874, Barnes secretly made some arrangement with S. P. Adams and C. M. Watlington, by which he claims to have sold some interest in the mill to them, but he refused to disclose what such arrangement was. Adams and Watlington are in the joint possession of the mill, and receiving the rents and profits. The bill avers that Adams and Watlington knew all the above facts, and that Johnson owned one-third interest in the mill. The bill then avers that the mill is situated on land of one William Neighbors, who claims some interest in the mill.

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The defendant Neighbors disclaimed any interest in the mill.

The prayer of the bill is that an accounting be had with J. C. Parkinson as to the amount, if any, due on the notes given by Johnson and Edward Parkinson; that upon payment of the amount thus found due, the note of Robertson, made payable to J. C. Parkinson, be declared the property of Johnson; that if the court should be of opinion that the sale of the mill by Barnes under the mortgage of Robertson, was a valid sale, that the purchase be declared made for the benefit of Johnson, and that an account be taken between Barnes and his vendors, Adams and Watlington; that if the court should be of opinion that the sale by Barnes was invalid, that the court would decree a foreclosure of that mortgage and a distribution of the proceeds. The bill also contains a prayer for general relief, and for a temporary injunction against Barnes, Adams and Watlington, to prevent them from running the mill.

There was a demurrer for multifariousness, which the Chancellor sustained, and dismissed the bill. From that decree Johnson appeals to this court.

WATTS & SONS, for appellant.

W. H. BARNES, *contra*.

BRICKELL, C. J.—1. It is a matter of some difficulty to ascertain from the prolix statements of this bill with any degree of certainty, what relief the complainant intends to seek, or against whom it is prayed. We suppose, after a patient and careful examination, that it was intended to obtain relief against the note for one thousand dollars, made by the complainant and Ed. Parkinson, payable to John C. Parkinson, because of its fraudulent alteration by the insertion therein after its execution, without the consent of the complainant, of words which make it bear interest from date. Assuming the allegations of the bill to be true, in reference to this matter, as must be done on demurrer, a case is presented—a right to relief—with which none of the defendants, except the Parkinsons, and perhaps Barnes, have any connection whatever, and in which they have no interest.

2. In another aspect in which the bill may have been intended to seek relief, that of the right of the complainant as a tenant in common of the mill, to an account of the rents and profits from his co-tenants, who have had exclusive use and possession of it, it is obvious, the Parkinsons are not

[*Sprayberry v. The State, use, &c.*; *Burks v. The State, use, &c.*]

necessary or proper parties. They are not connected with this claim, have no interest in it, and no relief can be granted against them in reference to it.

3. In any of its aspects the bill seems to fall within the accepted definition of multifariousness.—*Story's Eq. Pl.* § 271; 1 *Dan. Ch. Pr.* 334, and notes.

Let the decree be affirmed.

Sprayberry v. The State, use, &c.

Burks v. The State, use, &c.

Real Actions in Nature of Ejectment.

1. *Sixteenth section lands; what necessary to fix title of, in the State.*—Under the act providing for the admission of Alabama into the Union, and the propositions therein contained, “that section number sixteen in every township, and where such section has been disposed of, other lands most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools,” which were accepted by the people, no other act on the part of the State or general government was necessary to separate the sixteenth section from the balance of the public domain; and a survey by the government identifies and distinguishes it.

2. *Lands granted in lieu of sixteenth section; what sufficient to vest title to, in the State.*—In order to invest the State with title to lands granted in lieu of sixteenth sections, legislation by Congress was necessary to select and identify such lands; and under the act of May 20, 1826, a mode of selection was provided, which required that the secretary of the treasury select other appropriate lands within the district in which such townships were situated, and it was declared when such lands were selected, they should be held by the same tenure and upon the same terms as the 16th section. Under this act, a selection of lands by the receiver of public moneys, of the district where the lands are situate, communicated to the commissioner of public lands, which had by the latter officer been communicated to the secretary of the treasury in accordance with instructions for that purpose, and approved by the secretary, vests the title to the lands thus selected in the State.

3. *Evidence; what admissible.*—A certified transcript from the general land office, showing a selection of lands for the benefit of a township, under the act of May 20, 1826, and its approval by the secretary as therein provided, is competent evidence to support an action of ejectment by the State, although such transcript fails to show on its face that the sixteenth section had been disposed of in the township to which the lands were allotted, the presumption being that all facts necessary to sustain the action of the secretary of the treasury existed; and the papers showing such selection being on file in the general land office, a certified transcript by the head of that department is admissible.

APPEAL from Coosa Circuit Court.

Tried before HON. WILLIAM L. WHITLOCK.

These were real actions brought in the name of the State for the use of the public schools in township 23, range 20, to recover certain lands in township 24, range 20, in Coosa

[*Sprayberry v. The State, use, &c.*; *Burks v. The State, use, &c.*]

county, Alabama. The plaintiff offered in evidence a certain certified transcript from the records of the general land office, which shows that on the 8th day of April, 1839, the commissioner of public lands communicated to the secretary of the treasury a list of tracts of land in Montgomery district, Alabama, selected for the use of schools under the provisions of the act of the 20th of May, 1826. This list is signed by the receiver of public moneys at Montgomery, and embraces the land in question, as selected for township 23, range 20. It was approved by the secretary of the treasury, on the 10th of April, 1839. To the introduction of this transcript the defendant objected. His objections were overruled, and he excepted. This was all the evidence, and the court, at the request of the plaintiff, charged the jury, "that, under the evidence, they would find the issue for the plaintiff," and the defendant excepted.

W. D. BULGER, for appellant.—The exemplification of the record of the land office, without more, does not authorize a recovery by plaintiff. Plaintiffs sue to recover a part of section 17, township 24, range 20, for use of section 23, range 20, for school purposes. The court will observe that section 16 of every township is appropriated by the United States government to the townships for school purposes. The grant of section 16 is made by statute—act of Congress, March 2, 1819—and when the same has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the same parties for such use. Then, before plaintiffs can recover, they must show the disposition of the 16th section, and a location on other and contiguous thereto, and a grant from the government to the same to them, or those under whom they hold, before recovery can be had. In the present case the land sued for is not contiguous to the 16th section of township 23, range 20, but are in a different township. It appears that the plaintiffs have failed to show any grant from the government, or that any of the contingencies existed authorizing the floating in other lands than the 16th section, or that the township suing has in any way failed to get its full 16th section.

S. J. DARBY, *contra*.—The act of Congress of 1819, together with the ordinances of the convention accepting the propositions embraced in the act, clothed the State with the legal title to the sixteenth section in each township. - *Lang v. Brown*, 4 Ala. 622. In 1826 an act of Congress was passed appropriating other land in lieu of the 16th section when that section had been disposed of. This act provided the mode

[*Sprayberry v. The State*, use, &c.; *Burks v. The State*, use, &c.]

of selecting the land, and provided that it should be held by the same tenure, and upon the same terms, for the support of schools in such township as section number sixteen is. This act required the secretary of the treasury to select the lands thereby appropriated, and when this duty was performed, the legal title vested in the State. The transcript from the land office was admissible.—See Code, §§ 3043, 3044, 3066; 25 Ala. 716. All the presumptions are in favor of the legality and regularity of the action of the secretary in selecting the lands in question.—2 Stew. 255. The defendant was a mere intruder, and as such can not question the regularity of the patent.—*Crommelin v. Winter*, 9 Ala. 594; see, also, *Dunklin v. Wilkins*, 5 Ala. 199; *Conico v. Riddle*, 21 Ala. 794.

BRICKELL, C. J.—These are statutory real actions, instituted in the name of the State, *for the use of public schools in township 23, range 20*, in Coosa county. The questions involved are the same in each case, and are dependent upon the same state of facts, differing in no other respect than that the actions are for the recovery of several parcels of land.

The act of Congress enabling the people of the territory of Alabama to form a constitution and State government, preparatory to admission into the union, submitted for the acceptance or rejection of the people, several distinct propositions, the first of which was “that the section numbered sixteen in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.” These propositions were accepted by the representatives of the people in convention assembled. The proposed grant of the sixteenth section of every township, was subject to the exception of such sections as had been sold, granted, or disposed of; and then the proposition was, that other lands equivalent thereto, and most contiguous to these sections, should be granted. The proposition consequently assumes a two fold form. If the section sixteen had not been sold, granted, or disposed of, whenever it was surveyed and identified, the law intervened, perfecting the title of the State to that section. No act on the part of the State—none other on the part of the general government, was necessary to separate it from the public domain. The grant by the general government, which the State accepted, severs it, and the survey under the authority of the former, identifies and distinguishes it.—*Cooper v. Roberts*, 18 How. 173.

[*Sprayberry v. The State, use, &c.*; *Burks v. The State, use, &c.*]

When, however, that section had been sold, granted, or disposed of, preventing the grant to the State from being operative, the proposition is, to grant other lands *equivalent thereto, and most contiguous to the same*. To render this grant effectual, legislation by Congress was necessary. A mode of selecting, appropriating, and identifying such lands must have been provided, or there would not have been a grant, no more than the bare promise to grant, without a designation of the subject on which the grant was to operate. By the act of May 20, 1826 (4 U. S. Statutes, 179), entitled "an act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," in those States in which section number sixteen, or other land equivalent thereto, is by law directed to be reserved for the support of schools in each township, the townships in which section sixteen had been disposed of, were provided for, by directing and requiring the secretary of the treasury to select other unappropriated lands within the district in which such townships were situated; the act declaring, when such lands were selected, they "should be held by the same tenure, and upon the same terms, for the support of schools in such township, as section number sixteen is, or may be held, in the State where such township shall be situated." On the 24th of the same month, the treasury department, through the general land office, directed the registers of the different land districts to make selections of such lands, and return lists for the approval of the secretary of the treasury; subsequent instructions were issued to the registers, accompanied by printed forms and directions, so that the returns should be uniform, and the lands selected were required to be noted, and were reserved from entry and sale. If good lands could not be obtained in the township, the selection was authorized in the nearest adjacent township containing such lands.—*Campbell v. Doe*, 13 How. 244.

The lands now in controversy are not in township 23, but in the adjacent township of 24. The title of the State rests upon the claim that those lands had been by the secretary of the treasury selected under the act of May 20, 1826, for the use or support of schools in township 23. The evidence in support of the claim, was a certified transcript from the records of the general land office, which shows that on the 8th of April, 1839, the commissioner of public lands communicated to the secretary of the treasury, "a list of tracts of lands in Montgomery district, Alabama, selected for the use of schools, under the provisions of the act of 20th May, 1826." This list conforms to the printed forms and directions prescribed, and purports to be signed by the receiver

[*Sprayberry v. The State*, use, &c.; *Burks v. The State*, use, &c.]

of public moneys, at the land office at Montgomery, and embraces the lands in controversy, as selected for township 23. It was approved by the secretary of the treasury on 10th of April, 1839.

Several objections were made to the admission of this transcript. The first of which is, that it does not appear therefrom, that the 16th section of township 23 had been sold, granted, or disposed of, by the United States, and therefore the fact on which the power of the secretary of the treasury depended, did not appear. That fact not appearing, the argument is, the selection was unauthorized, not clothing the State with the title.

The appellants do not claim title to the lands; so far as is shown by the records, they are mere intruders. Against them, however, the State could not recover without legal title, or a legal right to the possession of the lands. To what extent, and in what mode, one having acquired title, or color of title to the lands, from the general government, could dispute the regularity and validity of the proceedings of the secretary of the treasury, is not the question for consideration. The secretary of the treasury was, by the act of Congress, clothed with a large power, to be exercised in advancement of a settled and cherished policy, to aid the new States in the establishment of schools. The power, it is true, was special, and to be exercised only for the benefit of such townships as had not obtained the sixteenth section therein situate. If exercised in favor of other townships, to the prejudice of the government, or of individuals claiming under the government, the mode of vacation could easily be ascertained. Until the act of the secretary is vacated, it stands protected by the presumption, that all public officers, and especially one of the character and dignity of the secretary of the treasury, has properly performed his duty. If before acting, facts are to be ascertained, the presumption is, that he has ascertained the existence of such facts. The want of a recital in his official act, that such facts exist, does not avoid or detract from the presumption, nor would such recital add to its force.—*P. & T. R. R. Co. v. Stimpson*, 14 Pet. 458.

The next ground of objection is directed rather against the effect, than the admissibility of the transcript. It is, first, that the communication of the receiver of public moneys at Montgomery, Alabama, containing the list of lands selected, directed to the commissioner of public lands, and the communication of the commissioner to the secretary of the treasury, are not public documents, and hence there is no authority to certify them. The mode of selecting the lands,

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under act of May 20, 1826, the secretary of the treasury must of necessity have prescribed. The act itself does not prescribe it, and these papers seem to conform to the regulations the secretary of the treasury adopted. The certificate shows, that these papers are of file in the general land office, and the statute renders them, when authenticated by the head of the department, admissible in evidence.—Code of 1876, §§ 3044-46.

The second ground of objection is, that some other act than the selection by the secretary of the treasury, is necessary to clothe the State with the legal title to the lands. This we have anticipated. No other act is necessary, than the approval by the secretary of the selection made by the register of the land district, under the instructions which had been given. The selection having been made and approved, the act of Congress confers the legal title.—*Kissell v. St. Louis Public Schools*, 18 How. 19; *Cooper v. Roberts*, *Ib.* 173; *Campbell v. Doe*, 13 How. 246. The tenure of the State is that upon which the 16th section is held, of which lands these are but the substitute and equivalent.

Let the judgments be affirmed.

Sumter County v. The National Bank of Gainesville.

Action for Taxes.

1. *National Banks; how far subject to State taxation.*—National banks are not subject to State taxation, except in so far as Congress authorizes it.

2. *Same.*—Under the acts of Congress, national banks having their stock invested in United States bonds, are not subject to taxation on their capital stock, under State authority.

3. *Assessment; what invalid.*—An assessment upon the capital stock of a national bank, by an aggregate or gross assessment, is irregular and invalid.

4. *Taxation by State; what subject to.*—Shares in such banks are subject to State taxation against the individual shareholders.

5. *National bank; when required to pay tax assessed against shareholder.*—When the State statute authorizes it, the banks may be compelled, by suit, to pay the taxes so assessed upon the shares.

6. *Taxes on shares; how collected.*—In the absence of such legislation, such tax upon the shares is collectible of the shareholders, in the same manner as other taxes are collectible of individuals.

7. *Act of February 23, 1875; how far inoperative.*—The act to restrict the power of taxation, &c., approved February 23, 1875, so far as may be supposed to relate to the capital stock of national banks, is inoperative.

8. *Subdivision 7, section 369, of Code of 1876; constitutionality of.*—So much of section 369, subdivision 7, of the Code of 1876, as provides for the collection of a State tax of seventy-five cents on each share of the capital stock of

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national banking associations, &c., and providing that such taxation shall be in lieu of all other State, county, and municipal taxation on such shares, is in conflict with the constitution, and void.

9. *Same; what part of inoperative.*—That part of said subdivision which exacts that said tax “shall be paid by each such associations for the shareholders thereof,” being dependent upon the other unconstitutional portions, and incapable of independent operation, is inoperative, and imposes no duty on the national banks to pay such taxes.

10. *Shares of national banks; under what section of Code now assessed.*—Under the statutes of this State now in force, shares of the capital stock of such banks can be assessed only under subdivision 13 of section 362 of the Code.

11. *Assessment; what illegal.*—An assessment upon the capital stock in the aggregate instead of against the shares, being irregular and invalid, and there being no valid act of the legislature requiring the bank to pay the tax against the shares when properly assessed, a county has no right of action against the bank for the refusal to pay the amount assessed against the capital stock.

APPEAL from Sumter Circuit Court.

Tried before Hon. LUTHER R. SMITH.

The opinion states the facts.

S. H. SPROTT and THOMAS B. WETMORE, for appellant.—The act of Congress of 1863, called the “national currency act,” was silent as to taxation by the State.—U. S. Stat. at Large, 1863, p. 665. But the act of Congress of 1864 put it beyond question that these banking associations were liable to taxation by the State, subject to the two restrictions therein named.—U. S. Stat. at Large, p. 112. And the act of February 10, 1868, now forming section 5219 of the United States Revised Statutes, removes all restriction on the power of State taxation over the shares of national banks, except that the rate of taxation shall not be greater than is assessed upon other money capital in the hands of individual citizens, and that they shall be taxed at the place where the bank is located.—*Lionberger v. Rouse*, 9 Wall. 477.

It is proper to require the bank to pay the taxes, and it is the usual course in the New England States, and is the plan adopted by the United States government itself.—*National Bank v. Commonwealth*, 9 Wall. 358. The taxation upon the bank is but a tax upon the new uses and privileges conferred by the charter of the association.—*Van Allen v. Assessors*, 3 Wall. 582-3. The revenue act of Alabama of 1875, pages 6 and 7, fixes the rate of taxation, at the same time prescribing the mode and manner of collecting the same.—Code of 1876, § 369, subdivision 7. A part of subdivision 7, § 369, seeks to exempt banks from county tax. That part of the subdivision is unconstitutional, but an act may be partly constitutional and partly unconstitutional.—1 Brick. Dig. p. 361; *Lehman, Durr & Co. v. Robinson*, 60 Ala. 10. As to the unconstitutionality of that part of the act which attempts to exempt from county tax, see 53 Ala. 580. The

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mere fact that Sumter county did not collect the taxes due it, each year acquiescing for the time in an unconstitutional statute, does not preclude it from now taking steps to collect it.—*Perry County v. Selma, Marion & Memphis R. R. Co.*, 58 Ala. 546; Cooley on Taxation, 300, 152, 154. And such taxes could be collected by an action at law.—*Perry County v. Selma, Marion & Memphis R. R. Co.*, *supra*.

SNEDECOR & COCKRELL, and W. G. LITTLE, Jr., *contra*.—To enable a State to reach the interest of the shareholder for the purpose of taxation, it must proceed in conformity with the provisions of the national currency act, under and by virtue of which this species of property is alone taxable by the State.—Rev. Stat. U. S. § 5219, p. 1015. But the legislature of each State may determine and direct the manner and place of taxing all the shares. The act of Congress conferred power on the legislature to tax, not on the constitutional convention, and the power thus conferred was not subject to any restrictions save those contained in the act. The constitutional convention of the State had no power to impose any additional restrictions. The power of the legislature to tax was derived from the United States, and the State constitution could impose no restrictions upon it.—See 33 N. Y. 243. The only law of the State of Alabama providing for taxation of shares in national banks, does not contain the restrictions contained in the federal act, and hence there is no law in the State of Alabama which authorizes the State to tax the shares.

If the subdivision of section 369 of the Code is constitutional, it is clear there is no tax due from the bank or its shareholders to the county. The legislature, by the terms of the national currency act and its amendments, is permitted to tax the shares of national banks, but it is not required to do so. The constitutional provision which it is supposed the subdivision of section 369, above referred to, violates, was intended to apply, and does apply, exclusively to the inhibition of the legislature from discriminating in the exercise of its taxing power in favor of corporations created by it, under the constitutional clauses granting it power to create corporations, and not to that class of corporations which existed independently of the legislature.

The conclusion, then, is irresistible that the Gainesville National Bank, as a corporation, cannot be taxed as a corporation; can not be taxed for the shares of its stockholders, in the absence of legislation authorizing it, and the only legislation authorizing it is subdivision 7 of section 369 of the Code of 1876. If that legislation is constitutional, the na-

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tional bank is not liable to a county tax; if it is not constitutional, there is no act of the legislature which authorizes a national bank to be assessed for taxes due from its shareholders.

STONE, J.—The present complaint contains many counts, but in each one the taxes claimed are averred to have been assessed upon the capital stock of the defendant corporation, by an aggregate or gross assessment. In the case of *The National Commercial Bank of Mobile v. Mayor, &c., of Mobile*, we ruled that such assessment is irregular and invalid, and that the capital stock of a national bank can not be the subject of State taxation.—See that case *ante*, page 284. In the counts of the amended complaint, it is averred that the defendant—the national bank—“according to the statute in such cases made and provided, rendered to the tax assessor of Sumter county a list of property liable to taxation, and included in said list one hundred thousand dollars, capital stock, the same being the aggregate of all the shares of the stockholders in said bank, the taxes upon which were required, by the statute in such cases made and provided, to be paid by the defendant for the shareholders thereof.” These counts then aver the amount or rate of taxes that was levied by the court of county commissioners for county purposes, and continue: “And, by virtue of the premises, the defendant became liable to pay the plaintiff the sum of . . . dollars for taxes as aforesaid; that amount being the amount of taxes due the plaintiff on the aggregate amount of said shares of stock.” The circuit court sustained a demurrer to the complaint, and the plaintiff brings the case here by appeal.

It is very true, as stated in the case of *The National Commercial Bank v. The Mayor, &c., supra*, that the distinction between the capital stock of a bank and the shares of stock in the bank, is somewhat technical; the former being but the aggregation of the latter. But it is the difference between the several parts and the whole; between the tributaries and the congregated volume which forms the river; between the several partners and the aggregated partnership; between an artificial entity, called a corporation, having a local habitation and a name, capable of suing and being sued, and which may survive all the shareholders of any given period, and the several owners of the shares, who are commonly real persons, and who may undergo constant change, by transfer or death, without disturbing or affecting the continuance or identity of the corporation. They are, in law, different persons. The policy of denying to the

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State legislatures the privilege and power to tax the capital stock of national banks, while expressly granting them the right to tax the shares in such corporations, was a question for the Congress of the United States, not for us. Ever since the decision in the case of *McCulloch v. Maryland*, 4 Wheat. 316, it has been steadily maintained that such banking institutions are not subject to State assessment for taxes, except as the Congress may grant the privilege. Hence, it is a question of power conferred, not of policy. That the capital stock of banks can not be made a subject of State taxation, see *Bank Tax Case*, 2 Wall. 220; *Van Allen v. The Assessors*, 3 Wallace, 573; *People v. The Commissioners*, 4 Wall. 248; *National Commercial Bank v. Mayor, &c.*, ante, 284. Speaking of the distinction between the capital stock of a bank and the shares in such capital stock, Justice NELSON, in *Van Allen v. The Assessors*, 3 Wall. 583-4, says: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder, like any other property that may belong to him. It is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed." For an able discussion of these questions, see Burroughs on Taxation, 120 to 128.

The act of Congress, which authorizes the States to levy and collect taxes on the shares in national banks, is in the following language, Revised Statutes of the United States, section 5219: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by the authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual

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citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in any city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations, from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." We think it is difficult to misunderstand the various provisions of this statute. It clearly confers on the several States the power and authority to levy upon *the several shareholders* in a national bank located in the State, a tax, subject only to the two named restrictions, and clothes the legislature of the State with power to determine and direct the manner and place of taxing the shares of all such banking associations located in their respective States. It also requires that the shares of non-resident stockholders shall be taxed in the city or town where the bank is located, and not elsewhere. Under this statute it has been rightly held that the State in which the national bank is located has the exclusive right to derive revenue from the shares of such bank, no matter where the shareholders may have their domicile. It is also settled that the legislature of a State may, by law, make it the duty of the bank to pay taxes thus levied on the shares of the shareholders.—*National Bank v. Commonwealth*, 9 Wall. 355.

It is contended for appellant that the case last cited affirms the validity of the levy and assessment in this case, and shows that the present action is well brought. According to our construction of the language of the court in that case, it is perfectly reconcilable with the language of this court in *National Commercial Bank v. Mayor, &c.*, *supra*, and with all the other cases cited. The tax levied in that case by the legislature of Kentucky was in the following language: "On bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or, on each one hundred dollars thereof, owned by individuals, corporations, or societies." This was clearly a levy of the tax on *the shares* of the bank, and not on the capital stock. The statute further provided that "the cashier of a bank, whose stock is taxed, shall, on the first day of July in each year, pay into the treasury the amount of tax due." Speaking of the section levying the tax, first copied, the Supreme Court of the United States, by a unanimous opinion affirming the judgment of the Supreme Court of Kentucky, said: "We entertain no doubt that this provision was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the indi-

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vidual or corporation owning such shares, in the same manner as other taxes are collected from individuals. It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more, or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but the tax is the same in each case. This shows that it is the shares which are intended to be taxed, and not the cash, or other actual capital of the bank." In that case the distinction was carefully drawn between the shares of stock in a bank, and the capital stock. The State had demanded payment of the tax from the bank, and being refused, suit was brought, and a recovery had. The case is an authority for these propositions: First, that national banks, having stock invested in United States bonds, are not subject to taxation on their capital stock, under State authority. Second, that shares in such banks are subject to taxation against the shareholders. Third, that when the State statute authorizes it, the bank may be compelled by suit to pay the taxes so assessed upon the shares; and, fourth, in the absence of such legislative direction, such tax is collectible of the shareholders, in the same manner as other taxes are collected from individuals.

It results from what we have said that the act "to restrict the power of taxation," &c., approved February 23, 1875, Pamph. Acts 49, so far as it may be supposed to relate to the capital stock of national banks, is inoperative.

Should the tax be levied on the *shares* of the stock of the bank, as we have shown it may be, then the only authority for requiring the bank to pay such assessment, is found in subdivision 7, section 369, of the Code of 1876. That section is composed of three paragraphs, separated by semicolons. The first and third of those paragraphs are clearly unconstitutional, under the principles declared in *Mayor, &c., v. Stonewall Insurance Company*, 53 Ala. 570. We need not re-state the argument. The second clause refers to the first, is dependent on it, and can not have an independent operation, the first being swept away. It relates to the tax authorized by the first paragraph, and to nothing else. Having shown that tax to be unconstitutionally levied, the second clause has no field of operation. Its language is "the same," that is, the tax of seventy-five cents on each share of one hundred dollars of the capital stock of every national banking association, to be in lieu of all taxation, State, county, and municipal, on such shares, "to be paid by each

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such association for the shareholders thereof." There is, then, no statute which requires the national banking associations to pay the State tax on the shares of such associations. It follows that such tax can only be assessed under subdivision 13, of section 362, Code of 1876, and can be collected only as taxes against other individuals are collected. This would work an affirmance of the judgment of the Circuit Court, even if the tax had been assessed against the several shares.

Affirmed.

BRICKELL, C. J., dissenting.

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Habeas Corpus.

1. *Municipal corporation organized under Code; powers of.*—The authorities of a town incorporated under the provisions of the Code, (Chap. I, Title 14, Part 1, Code of 1876,) have no authority, upon conviction for breach of their by-laws and ordinances, to punish the offender by *imprisonment*, except in cases of a "breach of the peace or disorderly conduct;" in other cases, the punishment must be a fine, and upon default of payment, the offender may be sentenced to "hard labor on the streets of the town, for a period not exceeding thirty days."

2. *Same; what sentence illegal.*—A sentence upon conviction of a breach of a by-law or ordinance of such town, (other than those relating to breaches of the peace or disorderly conduct,) or a warrant or *mittimus* based on such sentence, which directs the marshal to take the offender "in custody and detain him until fine and costs are fully paid," is without warrant of law, in that it inflicts "*imprisonment*," when the charter provides "hard labor," and is also indefinite in duration, whereas the law limits it to a period not exceeding thirty days.

3. *Habeas corpus; when should be granted.*—One detained under such sentence, or a *mittimus* based on it, is entitled to a discharge on *habeas corpus*.

4. *Statute; what will not invalidate.*—If a statute contains provisions which are not referable to its title, and such foreign matter is divisible from that which is clearly within the title, and the latter can stand and have effect without the former, then only so much of the act as is not embraced by the title is void.

5. *Title of act; what within.*—Where the title of an act is "to incorporate the town of Munford, in the county of Talladega," the insertion of a section in the act which makes it misdemeanor to sell or give away spirituous liquor within the corporate limits, is within the purview of the act, and sufficiently expressed in the title, and is constitutional.

6. *Municipal corporation; what will not accomplish dissolution.*—The mere non-user of its powers by a municipal corporation, does not *ipso facto* work its dissolution. It will require a judicial sentence to effect its dissolution.

7. *Incorporation; what invalid.*—Where a town has been regularly incorporated by act of the legislature, which act is still in force, the Probate Judge is without authority, under the provisions of the Code, to grant a second

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charter; his powers in the premises are limited to towns not already incorporated. Towns cannot have at one and the same time two co-existing charters of incorporation.

8. *Same; legality of, how cannot be enquired into.*—The legality of charters of corporations cannot be assailed in a collateral proceeding. Neither can one colorably in office, and publicly exercising the functions of a municipal officer, be treated as a usurper, and resisted as such. He is an officer *de facto*, and must be submitted to, until displaced by a direct proceeding for that purpose.

This was an application by the petitioner, S. T. Moore, for a writ of *habeas corpus* and *certiorari* to effect his discharge from alleged illegal imprisonment, and to revise an order of Hon. John Henderson, made upon application for *habeas corpus* before him, refusing the writ. The agreed facts of the case are as follows: On the 11th day of August, 1868, the legislature passed an act entitled "An act to incorporate the town of Munford, in the county of Talladega." The fifth section of this act makes it "a misdemeanor, punishable by fine and imprisonment, for any person to sell, give, or otherwise dispose of any intoxicating liquors, &c., within the corporate limits of said town; *Provided*, That druggists may sell for medicinal purposes." Section five treats of no other subject. There was no organization under the act of 1868, until that act was amended by the act of February 9th, 1871, which latter act provides "that an election should be held for an intendent and six councilmen as officers of said corporation of Munford, on the first Monday in April, 1871," and appointed inspectors to hold said election, requiring them to give notice, &c. No election was held under this latter act until the first day of April, 1872, on which day an election was held by the officers appointed by the act of 1871, in compliance with all the terms of that act, except as to time. The officers elected at this election accepted, qualified and entered upon the discharge of their respective duties, and continued to act as such until a new election was held on the first Monday in April, 1873, when the same officers were re-elected, and were exercising the duties of their respective offices when the charter was amended by the act of April 10, 1873. This amendment is not material to the point at issue in this cause. The last election under the charter granted by the legislature, was held on the first day of April, 1874. The officers then elected did not qualify. The charter of the town granted by the legislature, has never been declared forfeited or void by any direct judicial proceedings instituted for that purpose, nor had it ever been surrendered to or accepted by the legislature, nor had any repeal of the act been passed.

On the 21st day of March, 1879, citizens of said town pe-

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tioned the Probate Judge of Talladega county for a charter under the provisions of Part 1, Title 14, Chapter 1, of the Code of 1876, for the town of Munford, with the same limits and boundaries prescribed by the former charter granted by the legislature, which was accordingly granted by the Probate Judge as prayed for in said petition, on the 16th day of April, 1879. There was an election for officers of the corporation in conformity to the provisions of this charter, at which election A. J. Street was elected intendent, and an organization of the board of councilmen thereby elected. J. L. W. Stroud was appointed marshal. By section 1782 of the Code of 1876, it is declared that the corporate authorities of towns thus organized shall have the following power: . . .

9. "To impose fines, not exceeding fifty dollars, for breaches of their by-laws or ordinances, and to enforce and collect the same by execution against the property of the offender, or, in case of a breach of the peace or disorderly conduct, by imprisonment for a period not exceeding thirty days; and any person failing to pay the fine assessed against him under the provisions of this section may be sentenced by the officer or officers trying the case to hard labor on the streets of the town for a period not exceeding thirty days."

The municipal government elected and organized under the charter granted by the Probate Judge, made and passed a by-law prohibiting the sale of spirituous or vinous liquor within the corporate limits of said town by any person who had not first paid the said municipal authorities the sum of two hundred and fifty dollars per annum, and taken out a license from the said authorities for that purpose, under a penalty of twenty-five dollars fine for each violation of said ordinance.

The petitioner, S. T. Moore, was a citizen of Munford, engaging in a retail liquor business before the charter was granted by the Probate Judge, under a license from the State of Alabama and the United States, and refusing to pay the tax required of him by the ordinance, was arrested by the authorities on a charge of violating said ordinance, and fined twenty-five dollars. The intendent thereupon issued a *mittimus* to the town marshal, Stroud, which recited trial and conviction of petitioner and his sentence to pay a fine of twenty-five dollars and costs, commanding the marshal "to receive him into custody and detain him until such fine and costs are fully paid."

Being in the custody of Stroud under this *mittimus*, petitioner applied to the Hon. John Henderson, Circuit Judge, for *habeas corpus*. On the hearing of this petition, the Circuit Judge was of opinion that the original charter granted

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by the legislature in 1868 to the town of Munford, was unconstitutional, because the act incorporating it contained more than one subject, and that the subsequent incorporation by the Judge of Probate was valid. He dismissed the petition and remanded petitioner to the custody of Stroud. Moore thereupon renewed his application to this court.

BOWDON & KNOX, and RICE & WILEY, for petitioner.—There was an existing corporation of the town of Munford, and the Probate Judge was without authority to grant a charter. Code of 1876, Part 1, Title 14, Chapter 1. The argument on the unconstitutionality of the charter granted by the act of 1868, rests on the idea that the fifth section of the act is not referable to the title, and is legislation on another subject, utterly foreign to the avowed object of the act. The object of that act was to incorporate the town of Munford. That object was accomplished by other sections of the act, and the rule is firmly settled that if the matter foreign to the subject matter is divisible from that which falls within it, and the latter can stand and have effect without the former, then only so much of the act as is not embraced within the title is void.—*Ex parte Pollard*, 40 Ala. 100; *M. & O. R. R. Co. v. The State*, 29 Ala. 573; *Lowndes County v. Hunter*, 50 Ala. 511; *Davis v. Minge*, 56 Ala. 458; *Comm. v. Green*, 58 Penn. St. 226. If the legislative charter was a valid subsisting one, there can be no doubt that the charter granted by the Probate Judge is a nullity and void.—2 Selwyn's *Nisi Prius*, 1176; *Rex v. Amery*, 2 Bro. P. C. 366; *Rex v. Mellio*, 6 T. R. 268; and any law enacted by the new corporation is void, because they act under a void charter.—*Butler v. Palmer*, 12 Mod. 247; Wilcox on Corp. 164; Abbot's Law of Corp. 164; 4 Zab. (N. J.) 393. If the charter of the town of Munford, granted by the act of 1868, was a constitutional enactment, the subsequent grant of incorporation by the Probate Judge was a nullity, and the pretended ordinance under which the petitioner was convicted is mere waste paper, and his imprisonment is illegal.

STONE, J.—The authority under which Stroud, the marshal of the town of Munford, asserts the right to hold the petitioner in custody, is a warrant or *mittimus*, reciting that Moore, the petitioner, had been tried and convicted under an ordinance of the town council, prohibiting retailing without license, &c., and adjudged to pay a fine of twenty-five dollars and costs. The warrant then proceeds: "You are therefore commanded to receive him (Moore) into custody, and detain him until such fine and costs are fully paid."

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This warrant was signed, "A. J. Street, intendent of the town of Munford." The agreed facts in this case show that the incorporation of the town of Munford, under which Street, the intendent, and Stroud, the marshal, claimed the right to act in the premises, was granted by the Judge of Probate under Chapter 1, Title 14, Part 1, of the Code of 1876, beginning with section 1763. Section 1782 is an enumeration of the powers of municipal corporations thus chartered. "The corporate authorities of such town have the following powers: . . . "9. To impose fines not exceeding fifty dollars, for breaches of their by-laws and ordinances, and to enforce and collect the same by execution against the property of the offender, or, in case of breach of the peace, or disorderly conduct, by imprisonment for a period not exceeding thirty days; and any person failing to pay the fine assessed against him under the provisions of this section, may be sentenced by the officer or officers trying the case to hard labor on the streets of the town, for a period not exceeding thirty days."

The petitioner was not convicted for a breach of the peace, nor for disorderly conduct, and hence could not be imprisoned as a punishment. His offense could be punished by a money fine, not exceeding fifty dollars, to be collected by execution against the property of the offender, with the further provision, that if he failed to pay the fine assessed against him, he might be sentenced to hard labor on the streets of the town, for a period of thirty days. Committing an offender to the custody of an officer, is depriving him of his personal liberty—is imprisonment. It is, in this case, indefinite in duration. "Until such fine and costs are fully paid," is the mandate. This is essentially different from hard labor on the streets. It is not for us to speculate on the relative hardship or odiousness of the two modes of punishment. Sufficient for us that the statute authorizes the one, and does not authorize the other. Conceding the incorporation to have been regular in every step of its organization, the imprisonment in this case was without warrant of law. This necessarily works a reversal of the judgment of the Circuit Judge.—*Steele v. The State*, and *Kirby v. The State*, December term, 1878.

Even if it were true that the act of the legislature incorporating the town of Munford—(Pamph. Acts of 1868, page 107)—is unconstitutional, because the act embraces two subjects, one of which is not expressed in the title, the effect would not be to invalidate the whole statute. The title of the act is, "To incorporate the town of Munford, in the county of Talladega." The argument is that section five of

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the act treats of an alien subject, not expressed or embraced in the title. That section makes it a misdemeanor, punishable by fine and imprisonment, for any person to "sell, give or otherwise dispose of any intoxicating liquors," &c., "within the corporate limits of said town," with a proviso that druggists may sell for medicinal purposes. Section 5 treats of this subject and nothing else. It is not dependent on any other clause in the statute, nor is any other clause dependent on it. It can be separated and struck out without affecting any other clause. Hence, its unconstitutionality could not destroy the validity of the remaining provisions of the act.—See the authorities in the excellent brief filed for petitioner. But we think the Circuit Judge erred in holding section 5 unconstitutional. The title of the act is a very general one—to incorporate the town of Munford. Under this caption, it was permissible to embrace and declare the purpose, powers and duties of the municipal corporation. Sanitary and police regulations are among the customary powers of such corporations. The 5th section was intended to secure the peace and good order of the town, and it was within the power of the legislature to prohibit the sale of intoxicating liquors within its corporate limits.—*Dorman v. The State*, 34 Ala. 216.

It is settled in this State, and such is the current of authorities, that a municipal corporation is not *ipso facto* dissolved or destroyed by a *non-user* of its powers. It requires a judicial sentence to effect the dissolution.—*Harris v. Nesbit*, 24 Ala. 398; *Welch v. Ste. Genevieve*, 1 Dil. Cir. Ct. Rep. 130; 1 Dil. Corp. § 110 *et seq.*; Ang. & Ames, Corp. § 771.

The incorporation of the town of Munford under the special and amendatory acts, being still of force, the Probate Judge had no power to grant a second charter under the general law. His powers in the premises were limited to towns not incorporated.—Code of 1876, § 1763. Further, towns cannot have, at one and the same time, two co-existing charters of incorporation. What, then, is the effect of the invalidity of the second attempt at incorporation? The question comes before us collaterally, not on a direct proceeding to vacate the charter, or to oust the officers, by a writ of *quo warranto*, or proceeding in the nature of it. The repose and well-being of society will not allow corporations to have their organizations practically annulled in a collateral proceeding. Nor can one who is colorably in office, publicly exercising its functions, be treated as a usurper, and resisted as such. He is an officer *de facto*, and must be submitted to as such, until displaced by a regular, direct proceeding, instituted for the purpose.—*Duke v. Cahaba Nav.*

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Co., 16 Ala. 372; *Dillard v. Webb*, 55 Ala. 468; *Piper v. Dennis*, 12 Mod. 253; *Rex v. Miller*, 6 T. R. 269; *Rex v. Osbourne*, 4 East, 327; *Buncombe Turnpike Co. v. McCarson*, 1 Dev. & Bat. 306; *Robinson v. London Hospital*, 21 Eng. Law & Eq. 371; *Heath v. The State*, 36 Ala. 273.

The writ of *habeas corpus* and *certiorari* will be awarded by this court, to bring before us the petitioner, together with the proceedings had before the Circuit Judge, unless, on another application, the Judge grants the relief to which the petitioner is entitled, as shown above.—*Ex parte Croom and May*, 19 Ala. 561-570.

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Real Action in Nature of Ejectment.

Deeds; what fraudulent and void as to existing creditors.—A mortgage by a father to a son, to secure a promissory note, contained the following clause: "If I fail to pay or cause to be paid said note, with interest from date, then, after my death and the death of my wife, Mary Robbins, and not till then, the said Solomon Robbins, Jr., (the son,) is authorized to seize and sell," &c. Subsequently the father and his wife make a deed of the same lands to their daughter and her husband, which recites that its consideration is, "First, that the said Kate Grayson (the daughter) and her said husband are to pay, discharge and satisfy, on or before the same becomes due and payable, a certain debt to my son . . . particularly described in a mortgage deed executed by me to my son to secure the payment thereof, which mortgage deed was executed by me about the 5th day of November, 1867. Second, that said Kate Grayson and her said husband, also, to pay to me or my order, or for my use and benefit during my life, or to my legal representatives after my death, the balance remaining due of said sum of two thousand dollars, purchase-money, after deducting the sum by them paid and expended for the satisfaction of said mortgage debt due to my son. Fourth, that the said Kate Grayson and husband are to suffer me and my said wife, mother of said Kate, to reside with them, as they are now doing, upon said premises, or elsewhere, as may be agreed upon by the parties, for and during the natural life of myself and my said wife, or either of us; and the said Kate Grayson and her said husband are to reside with me and my said wife, giving to us their society and sympathy, and contributing from the proceeds of said lands whatever our necessities, comforts and conveniences may reasonably require during the life of myself and of my said wife." Grayson and wife were in possession of the premises under the deed. *Held*:

1. That where the deed to Grayson and wife was attacked for fraud, by a creditor of the grantor, the mortgage to the son was competent evidence to show fraud.

2. That both the mortgage to the son and the deed to the daughter and her husband were fraudulent and void as to existing creditors of the grantor, without regard to the intention with which they were executed, and can furnish no defense to an action of ejectment brought by a purchaser of the lands, under an execution sale, to enforce the payment of a debt arising prior to the execution of the deeds.

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APPEAL from Coosa Circuit Court.

Tried before Hon. JAMES E. COBB.

The appellants, R. C. Sandlin and Martha A. Temple, as the administrators of Henry A. Temple, brought their statutory real action against the appellees, Solomon Robbins, Sr., Charles O. and Kate Grayson, to recover certain lands in Coosa county, Alabama.

The material facts may be thus stated: On the 5th of November, 1867, Solomon Robbins, Sr., executed a note to his son, Solomon Robbins, Jr., for \$903, payable one day after date, and to secure its payment he executed cotemporaneously a mortgage to him on the lands in question. This mortgage provides, among other things, that if the grantor "should fail to pay or cause to be paid said note, with interest from date, then, after my death, and not until then, the said Solomon Robbins, Jr., is hereby authorized to seize and take possession of the above described lands, either by himself or his agents, or his legal representative, and after having given at least three weeks notice of the time, place and terms of sale, to sell the above described lands to the highest bidder for cash," &c. This mortgage was acknowledged in proper form and filed for record on the day of its execution.

On the 2d day of November, 1872, Solomon Robbins, Sr., and wife executed a deed conveying the same lands to his daughter, Kate Grayson, upon the following conditions: 1st. "That said Kate Grayson and her said husband are to pay, discharge and satisfy, on or before the same becomes due and payable, a certain debt due from me to my son Solomon Robbins, Jr., of the county of Smith and State of Texas, particularly described in a mortgage deed executed by me to my son, to secure the payment thereof." 2. "That said Kate Grayson and her said husband, also pay to me or my order, or for my use and benefit during my life, or to my legal representatives after my death, the balance remaining due of said sum of two thousand dollars purchase-money, after deducting the amount paid by them for the satisfaction of said mortgage debt due to my said son, Solomon Robbins, Jr., as above specified." 3. "That the said Kate Grayson and her said husband are to go into the immediate possession and enjoyment of the above described lands, and of the rents and profits thereof, as the separate estate of the said Kate Grayson." 4. "That the said Kate Grayson and husband are to suffer me and my said wife, mother of said Kate, to reside with them, as they are now living upon said premises, or elsewhere as may be agreed upon by the parties, for and during the natural life of myself and my said wife, or either

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of us, and the said Kate and her said husband are to reside with me and my said wife, giving us their society, sympathy, and contributing from the proceeds of said lands whatever our necessities, comforts, or conveniences may reasonably require during the life of myself and of my said wife." *Lastly*, "that the title to the above and hereby granted lands and premises, shall be subject to the terms and conditions hereinabove described and set forth; rest in my said daughter Kate Grayson as her separate property under the provisions of the laws of the State of Alabama now in force, commonly called the 'woman's law.'" This deed was filed for record, in the proper office, on the 14th day of April, 1873. It was shown that before this deed was made Solomon Robbins, Sr., controlled and managed the property, and that after its execution Grayson managed the land, paying the taxes thereon and claiming it as the property of his wife.

On the 16th day of April, 1873, H. A. Temple, the intestate of appellants, recovered a judgment against Solomon Robbins, Sr., "on a demand which arose prior to the late war." Execution was issued on this judgment on the 30th day of the same month, and on the 22d of May following was levied on the lands in question. The property was advertised for sale under the execution, but the sale was suspended by the appellants as administrators of Temple, he having died after the rendition of the judgment.

On June 9th, 1874, a *scire facias* was issued and served on Solomon Robbins, Sr., and ten days later an execution issued on the judgment, in the name of the administrators, and was levied on the property sued for, and at a sale made under this levy, on the 7th of September, 1874, the appellants, as administrators, purchased the premises and received the sheriff's deed therefor. And on this title the defendants brought this action, to recover the lands, against Solomon Robbins, Sr., Charles O. and Kate Grayson. At the time of the sheriff sale and of the service of the process in this suit, Grayson and wife were in possession of the land, and Solomon Robbins and wife lived with them.

On the trial the plaintiffs proved the rendition of the judgment in favor of their intestate, the issuance of execution thereon, and a levy on and sale of the property thereunder, and a purchase by them in their representative capacities as shown above, and rested. The defendants, Grayson and wife, then offered in evidence the deed of Solomon Robbins, Sr., dated November 2, 1872. To this deed the plaintiffs objected: 1. Because it showed on its face that it was fraudulent and void. 2. Because it was not recorded within three months from its date, and was void as to judgment creditors. The

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court overruled the objections, admitted the deed, and the plaintiffs excepted. The plaintiffs then offered in evidence the mortgage to Solomon Robbins, Jr., referred to in the deed to Grayson and wife, "for the purpose of showing that the deed was fraudulent and void." The defendants objected to the introduction of said mortgage, the court sustained the objections and excluded the mortgage, and the plaintiffs excepted. The plaintiffs then offered said mortgage in connection with the deed to Grayson and wife, "for the purpose of showing that it was part of the same transaction, and that the two together were fraudulent on their face and void as to creditors." The defendants objected, the court sustained the objections, and the plaintiffs excepted.

The plaintiffs then offered said mortgage, in connection with the deed to Grayson and wife, "for the purpose of showing the fraudulent intent of the grantor and grantees." The defendants objected, the court sustained the objection, and the plaintiffs excepted.

The defendants then proved by Solomon Robbins, Sr., "that at the time he made the deed to Grayson and wife, he justly owed his son the sum therein named, as assumed by Grayson and wife. The plaintiffs objected to this evidence, the court overruled the objections, and the plaintiffs excepted. Upon this evidence the court charged the jury, "that the deed from Solomon Robbins and wife to Charles O. and Kate Grayson was not void upon its face, and unless they believed, from the evidence, that the deed was made with the intention of hindering, delaying, or defrauding his creditors, and that intention was participated in by the grantees, that the deed was not void as to creditors." To this charge the plaintiff excepted.

The plaintiffs then asked the court to charge the jury "that if they believed, from the evidence, that the deed conveyed all the property of Solomon Robbins, the effect of the deed was to hinder, delay and defraud creditors, and the grantors and grantees therein knew this, then the deed was fraudulent and void as to such creditors." This charge the court refused to give, and the plaintiffs excepted.

There was a verdict and judgment for the defendants, and the plaintiffs bring the case here by appeal.

LEWIS E. PARSONS, JR., for appellants.—The court should have excluded the deed to Grayson and wife; it was void on its face, and the objection to its admission compelled the court to pass on its validity.—1 S. & P. 139; 26 Ala. 172; 18 Ala. 741; 9 Port. 39. This deed was fraudulent in law; the grantor reserved to himself a beneficial interest, and,

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taken as a whole, it shows an intention to hinder, delay and defraud creditors.—See 18 Ala. 741. While it must be conceded that a debtor, owing beyond his ability to pay, may convey his property to one or more of his creditors, in payment of debts due them, to the exclusion of other creditors, when the known effect of the deed will cause loss to such creditors; when this is done, it must be done in good faith, and if any benefit is reserved to the grantor, or if the sale is conditional the sale is avoided, and when the intent to hinder, delay and defraud creditors appears on the face of the deed in any manner, it is void in law.—See, especially on this point, *Richards v. Hazard*, 1 Stew. & Port. 139. The deed referred to the mortgage to Solomon Robbins, Jr., and that mortgage became part of the deed. That mortgage was void on its face, and held the grantees in the deed to notice of its invalidity, and would not protect them in their purchase even if the purchase was made in good faith.—18 Ala. 741.

BULGER & BULGER, and BRAGG & THORINGTON, *contra*.—No deed can be pronounced fraudulent on its face, if its terms and stipulations are by possibility compatible with good faith, and have upon their face the essential elements of a legal contract.—Bump on Fraud. Con. 70. There was no error in the refusal of the court to admit the mortgage to Solomon Robbins, Jr. It was wholly irrelevant to any of the issues joined in this case. None of the parties to this suit set up any claim under the mortgage, and the consideration of the deed to the Grayson's was not that that the mortgage should be paid, but that the debt to Robbins, Jr., should be paid. That mortgage may have been void; that would be wholly immaterial, for the proof shows that the debt, to secure which the mortgage was given, is good and valid. Its introduction could throw no light on the intent of the parties to the deed. It was executed five years prior to the date of the deed. It would be absurd to say that deeds, with such intervals between them, could constitute one and the same transaction. It is permissible, when a deed is attacked for fraud, for proof to be made of other deeds *made about the same time*. Bump on Fraud. Con. 544-45. The deed to the Graysons contained no secret reservations. The only reservations are clear and open, and amount to nothing more than the reservation of a life estate, and that would not render the deed void.—Bump. on Fraud. Con. 211, 212; *Adams v. Broughton*, 13 Ala. 731. The utmost the appellants could do, would be to vacate the deed by showing actual fraud, or by proper proceedings to subject the life estate of the grantors.—*Low v. Carter*, 2 N. H. 433.

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STONE, J.—The present record does not inform us positively that Solomon Robbins, Sr., was insolvent, or unable to pay all his debts, when he executed the conveyance to Mrs. Grayson, his daughter, which this suit seeks to override as fraudulent. His financial condition, at that time, was an important factor in the solution of the issue before the jury. Robbins himself testified that the debt to Temple, which was reduced to judgment, and under which the lands were sold and bought by plaintiffs—the title under which they claim in this case—was contracted before the war. The war commenced in 1861. The conveyance to Mrs. Grayson was in November, 1872, eleven years afterwards. Temple's judgment was recovered in April, 1873—five months after the conveyance, and probably after Temple's suit had been instituted. The deed sets forth the consideration to be paid, as follows: "First, that the said Kate Grayson and her said husband are to pay, discharge and satisfy, on or before the same becomes due and payable, a certain debt due from me to my son, Solomon Robbins, Jr., * * particularly described in a mortgage deed executed by me to my son, to secure the payment thereof, which mortgage deed was executed by me about the fifth day of November, 1867, and is recorded in the office of the judge of probate of said county of Coosa, book M, page 110. Second, that said Kate Grayson and her said husband are to pay to me, or my order, or for my use and benefit during my life, or to my legal representatives after my death, the balance remaining due of said sum of two thousand dollars, purchase money, after deducting [the sum] by them paid and expended for the satisfaction of said mortgage debt due to my said son Solomon Robbins, Jr., as above specified." The third clause provided that Mrs. Grayson and her husband should go into immediate possession of the premises. "Fourth, that the said Kate Grayson and husband are to suffer me and my said wife, mother of said Kate, to reside with them as they are now doing, upon said premises, or elsewhere, as may be agreed upon by the parties, for and during the natural life of myself and my said wife, or either of us; and the said Kate and her said husband are to reside with me and my said wife, giving to us their society, sympathy, and contributing from the proceeds of said lands whatever our necessities, comforts and conveniences may reasonably require, during the life of myself and of my said wife. Lastly, that the title to the above and hereby granted lands and premises, shall be subject to the terms and conditions hereinabove described and set forth." It will be observed that this deed does not describe the debt to Solomon Robbins, Jr., its amount, or

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when and how payable. It refers to it simply as a debt particularly described in a certain mortgage. Still, by the terms of her title, Mrs. Grayson and her husband were bound to pay, discharge and satisfy that debt, on or before the same becomes due and payable; and it was made a charge on the lands in her hands. The present suit attacked Mrs. Grayson's deed for fraud. That deed certainly contained some unusual stipulations, and an understanding of the entire contract was necessary to a proper decision of the question of fraud *vel non*. The debt and mortgage to Solomon Robbins, Jr., were important elements in this inquiry, and the latter should have been allowed to go to the jury, as a material fact for their consideration. The Circuit Court erred in not allowing the mortgage to go to the jury.

The mortgage to Solomon Robbins, Jr., as we have said, was executed in November, 1867, more than six years after the creation of the debt to Temple, according to the testimony of Solomon Robbins, Sr. It is made to secure a note, described in the mortgage as bearing even date with the mortgage, due one day after date, for the sum of nine hundred and three dollars. The mortgage conveys the four hundred acres of land in controversy in this suit, and contains a power of sale in the following language: "If I fail to pay or cause to be paid said note, with interest from date, then after my death and the death of my wife Mary Robbins, and not until then, the said Solomon Robbins, Jr., is hereby authorized to seize and take possession of the above described lands, either by himself or his agent, or his legal representative," and after giving three weeks notice of time, place and terms of sale, to sell the lands for cash, and pay the mortgage debt with interest. As we have shown above, the payment of this debt according to the terms of the mortgage, was one of the stipulations of the contract, by which Mrs. Grayson purchased the lands. Reading the contract as shown by the two conveyances, no part of the purchase money was to be paid until after the death of both the elder Robbins and his wife; while, under the mortgage, the mortgagee was not allowed to take possession of the property under the mortgage, or to collect his claim by sale, until those two events should happen. And under the conveyance to Mrs. Grayson, the grantor and his wife reserved the privilege of residing on said land, and were to receive from the proceeds of said lands whatever their necessities, comforts and conveniences might require, during the life of the grantor and of his wife. It is manifest that under these conveyances, Robbins secured from the products of said land a support for himself and wife during the term of each of their

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lives, no matter how long they might severally live; and, under the deed to her, Mrs. Grayson secured to herself, during that uncertain and probably long time, the possession, use and enjoyment of the lands, subject to the charge above, without being compellable to pay any thing therefor. Is a conveyance of this kind valid against the claims of creditors?

Good faith requires that debtors shall honestly apply their property—that which is in excess of what the law exempts to them—to the payment of their debts. Beyond the legal exemptions, human ingenuity can not devise a plan by which a debtor can secure to himself the right to property, or a valuable interest therein, which creditors can not reach and condemn. This is common law, independent of statutory enactments.—*Rugely & Harrison v. Robinson*, 10 Ala. 702.

In *Stokes v. Jones*, 18 Ala. 734, a conveyance of land was made by a father to his son, containing a clause of warranty, and the condition that the grantor and his wife, in consideration of the conveyance, were to live with and be supported by the grantees." This court said, "The second charge of the Circuit Court was, that if the deed of the father, under which the plaintiff claims, was fraudulent as to the creditors of the former, he could not stipulate in the deed for any benefit to himself. If it was intended to say that such a stipulation or reservation would make the deed void, it was right. A debtor has no right to make such a reservation at the expense of his creditors, and with intent to defraud them." It will be observed that, in thus stating the principle, knowledge in the grantee of the grantor's fraudulent intent, is not stated to be essential to the application of the principle. In *Smith's Leading Cases*, 7th ed., vol. 1, part 1, discussing the principles of *Twyne's case*, and the numerous adjudications in the mother country and in this on the subject of fraudulent conveyances, it is asserted that one controlling reason why retention of possession by the grantor, contrary to the stipulations of the deed, is *prima facie* fraudulent, is the presumption it raises of secret trust, and benefit reserved, or secured to the grantor. See particularly pages 46, 48, 53. And speaking on this subject the court, in the great case of *Curtis v. Leavitt*, 15 N. Y. 9-132, say, it is the duty of a debtor to "reserve nothing to himself, but give all to his creditors." Bump on Fraud. Con. 2d ed. 208, speaking of the Stat. 3, Hen. 7, ch. 4, which in substance constitutes § 2120, Code of 1876, says, "It is not directed against trusts made with fraudulent intent, but against trusts themselves. There is not one word about intent, or object, or purpose, or excluding, injuring, or delaying creditors. The effect of the

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trust is not a subject for consideration. Its mere existence avoids the transfer, and destroys the title as against creditors existing or subsequent. A conveyance by the owner of property to another, in trust for himself, is in effect a conveyance to himself, and such a measure can never be necessary for any legal or honest purpose. He who, having the full title, desires to retain the control and use of his property, and yet transfers it to another, can, in the general course of human actions, have but one motive for that measure, and that motive must be to defeat or elude the claims of others. Hence, all conveyances to the use of the grantor, are fraudulent and null against creditors, and others having just claims upon the grantor, or upon the property conveyed. In all the refinements of uses and trusts, in the midst of multiplied distinctions between legal and equitable interests which have abounded in the progress of Anglican jurisprudence, this principle has never been doubted, and the mockery of a transfer by a debtor of his property, to be held for the use of the debtor, has never been allowed to defeat the rights or remedies of creditors." See, also, same book, 39 and 46; *Stokes v. Jones*, 21 Ala. 731; *Reynolds v. Welch*, 47 Ala. 200; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Ticknor v. Wiswall*, 8 Ala. 305; *Patterson v. Campbell*, ib. 933; *Montgomery v. Kirksey*, 26 Ala. 172; *Constantine v. Twelves*, 29 Ala. 606; *Reynolds v. Crook*, 31 Ala. 634; *King v. Kenan*, 39 Ala. 63; *Hall v. Heyden*, 41 Ala. 242; *Richards v. Hazzard*, 1 S. & P. 139; *Swift v. Fitzhugh*, 9 Por. 39; *Gazzam v. Poyntz*, 4 Ala. 374; *West v. Snodgrass*, 17 Ala. 549; *Cummings v. McCullough*, 5 Ala. 324.

Section 2120 of the Code of 1876, and the statute of 3 Henry, 7, speak alone of goods, chattels and things in action. It is a common law doctrine, however, and is applicable alike to realty. There never was a time when a debtor could convey his property directly, or in secret trust, for his own benefit, or for the use of his family, and thereby defeat his creditors of their lawful demands.—*Huggins v. Perrine*, 30 Ala. 396.

In the present case, there is no secret trust. Both the mortgage to the son and the conveyance to the daughter, express on their face that they secure a valuable interest to the grantor. They are both fraudulent and void against the claim and title of appellants, if the debt on which the judgment was recovered was contracted before they were severally executed; and this, independent of any intent with which the conveyances were executed. There was, on this question, but a single inquiry for the jury, namely: Whether the debt, on which Temple recovered his judgment, was older than the conveyances? If it was, the law pronounces

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them null and void, so far as that claim is concerned ; and the jury should have been so instructed.

Reversed and remanded.

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Certificate of Acknowledgment of Deed.

1. *Certificate of acknowledgment ; how may be impeached.*—The official certificate of acknowledgment of a deed, conforming substantially to the requirements of the statute, is presumed to be true, and is protected by the presumptions which the law indulges in favor of official probity. The burden of proof rests on those who assail its truth, and it can be impeached only by clear and convincing evidence of its falsity.

2. *Evidence ; what admissible.*—While evidence from parties to a suit, impeaching acts certified by an officer of the law, is jealously and carefully scrutinized, it is admissible to show the falsity of the certificate ; and when full and direct, is entitled to the same weight as would be accorded to the testimony of any other interested witness.

APPEAL from Henry Chancery Court.

Heard before Hon. N. S. GRAHAM.

The appellee, A. Proskauer, filed this bill against the appellant, Rebecca L. Barnett and others, and sought thereby to have corrected an alleged mistake in the description of certain land, which he claims under a writing purporting to be a deed from the appellant, Rebecca L., and also in certain other deeds from parties under whom said Rebecca claims title, and also to remove the cloud from the title to said lands caused by certain mortgages given by said Rebecca. The mortgagees under these mortgages were made parties defendant, and some of them filed cross-bills, praying a foreclosure of their respective mortgages ; but in the view which the court took of the case, these cross-bills need not be further noticed.

In the answer of the appellant, Rebecca L., she flatly denied the execution of the deed from herself under which complainant claimed, and also denied that she ever gave any one power or authority to sign a deed conveying said lands. On the trial of the cause, the complainant introduced what purported to be a fee simple deed of the lands in controversy, made by the appellant, R. L. Barnett, and acknowledged before John F. Iverson, a commissioner of deeds for the State of Alabama, residing in Georgia. The only evidence, other than the deed, as to its execution, was the testimony of the appellant, R. L. Barnett, and her husband. Interrogatories

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were propounded to them jointly, and they were required to look at an exhibit to the interrogatories, which is a copy of a deed which is the foundation of the complainant's suit in the above stated cause, and then state whether the witness, Rebecca L. Barnett, signed her name to said deed. She answered: "Having looked at 'Exhibit A,' she says she never signed said deed; that she has never seen or signed any such deed." In her subsequent testimony, she denies that she ever acknowledged the deed before the commissioner, or ever knew of its existence before the commencement of this suit.

Morris E. Barnett, her husband, admits that he signed her name to the conveyance, without her knowledge or assent, and that he made the acknowledgment before the commissioner.

The Chancellor decreed the reformation of the deed as prayed for, and from that decree the appellants bring the case here by appeal.

OATES & DENT, for appellants.

HENRY R. SHORTER, and D. M. SEALS, *contra*.

BRICKELL, C. J.—There can be no doubt that an official certificate of the acknowledgment or probate of a deed, conforming substantially to the statute, is presumed to be true, and authorizes the deed to be read in evidence as if the execution had been proved by the subscribing witnesses, or if there are none, by evidence of the handwriting of the grantor. If the execution of the deed was shown in the latter mode, countervailing evidence would be admissible. It could be shown that the subscribing witnesses had testified falsely, or that they were mistaken, or that the witnesses had no knowledge of the grantor's handwriting, or if they had, that they erred in supposing the signature to the deed was genuine. The certificate of acknowledgment, or of probate, taking the place of proof by the subscribing witnesses, or of the handwriting of the grantor, may also be contradicted, and parol evidence is admissible to falsify it. It is an official act, done under the obligation of an official oath, and protected by the presumptions the law necessarily indulges in favor of the acts of its own officers. The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution.

These were the views of the Chancellor, but he reached the conclusion the proof was not strong enough to remove

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the presumption of verity which the law attaches to the certificate of acknowledgment of the deed under which the appellee claims. In arriving at that conclusion, he seems to have supposed the proper construction of the evidence of Mrs. Barnett, the grantor, was that she did not sign the copy of the deed exhibited to her. We cannot think her evidence is susceptible of that construction. The interrogatory she is answering, requires her to look at an exhibit which is stated to be a copy of the deed, and answer not whether she signed the exhibit, but whether she "signed her name to said deed." The answer is direct and positive, that *she never signed*, not the copy, but *said deed*. And she states further that she has *never seen or signed any such deed*. Affirming as positively that she *had never seen*, as she does that she *had never signed*; an affirmation it cannot be supposed she would make, or was making, in reference to a paper at which she was then looking. Her testimony throughout is a clear and unequivocal denial of the execution of the deed, and of all knowledge of its existence until the commencement of this suit. She is corroborated by the evidence of her husband, who confesses having signed the deed in her name, without her knowledge or consent, and also, that he made the acknowledgment certified by the commissioner. The commissioner was not examined, and the appellee offered no evidence in support of the certificate. Evidence of this character, in contradiction of acts certified by officers of the law, proceeding from the parties in interest, is undoubtedly attended with great risks. The law admits it, and all the courts can do is to scrutinize it carefully. If it is full and direct, it is entitled to the same credit which would be given to the evidence of the other witnesses whose credibility was affected only by reason of interest.

It is said in argument, that the commissioner ought to have been examined by the parties impeaching the truth of his certificate. This examination, it seems to us, ought to have been at the instance of the appellee, who was forewarned of the necessity for it, by the explicit denial in the answer of Mrs. Barnett of the execution of the deed. Common prudence would have suggested to the appellee the necessity of such examination; and if any presumption arises from the absence of his evidence, it is against rather than in favor of the appellee. It is imputing to him a singular want of diligence to presume that he never made inquiries of the commissioner as to the truth of the certificate, when he knew it was assailed by pleading, and impeached by evidence flatly and fully contradicting it. We cannot, without disregarding the evidence, conclude that the execution of the deed under

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which the appellee deduces title, is not fully and clearly disproved, and the certificate of the commissioner falsified.

The decree of the Chancellor must be reversed, and a decree rendered here dismissing the bills, original and amended, of the appellee at his costs in the Court of Chancery. The several cross-bills must be dismissed at the costs of the respective complainants therein. The costs of this appeal must be paid by the appellee.

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Real Action under Code.

1. *Power of sale ; what execution of, invalid.*—Where a power of sale, contained in a trust deed, requires notice to be given of the time and place of sale, such notice is a pre-requisite to the execution of the power, and a failure to give it renders the sale invalid.

2. *Same ; regularity of proceedings under, who must show.*—It is incumbent on one claiming under the execution of a power of sale contained in a trust deed, to show that all pre-requisites to a sale under such power were complied with; and the recitals of a deed made by the person clothed with the power, is not evidence of such compliance as against one not a party or privy to the deed.

3. *Trust deed ; as to whom void.*—W. & B., on the 11th day of May, 1866, executed to H., as trustee, a deed of trust conveying certain lands to secure a debt partly for advances and partly created contemporaneously with the execution of the mortgage. This deed was not recorded until the 7th of February, 1870. Under this deed the trustee sold the land to plaintiff in May, 1870, and made him a deed in December, 1870. At the spring term, 1867, F. recovered a judgment against W. as principal and T. as surety. On the 14th November, 1867, T. paid the judgment, which was assigned to him. Execution on this judgment on the 18th of April, 1870, was levied on the lands in question, which were sold under it, on the 4th day of July, 1870, on which day the sheriff made a deed to W. as purchaser, who conveyed to defendant. *Held*—1. That the title of defendant W. was superior to that of plaintiff.

APPEAL from Washington Circuit Court.

Tried before Hon. HARRY T. TOULMIN.

The opinion states the facts.

L. H. FAITH, and W. BOYLES, for appellant.

W. F. GLOVER, and BRAGG & THORINGTON, *contra*.

STONE, J.—The bill of exceptions in this case affirms that it contains all the evidence, and upon it, the Circuit Court, at the written request of plaintiff, instructed the jury, if they believed it, they must find for the plaintiff. The plaintiff claimed title through a sale and conveyance made by Hous-

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ton, the trustee named in the trust deed executed by Wortham and Bethea. The trust deed recites an indebtedness to Parker, Lake & Co., and provides that "if the said W. N. Wortham and C. W. Bethea shall on or before the 9th day of November, 1866, fully pay off or discharge said indebtedness, with interest thereon, and shall pay whatever they may owe Parker, Lake & Co., on open account, this conveyance shall be void; but in default thereof, the said party of the second part [Houston, the trustee,] shall, after thirty days public notice in nearest newspaper to Buckaturna, proceed to sell the property before the court house door of said county, &c. In the deed made by the trustee to the purchaser, it is stated that "after giving said notice in accordance with the terms of said deed of trust (said debt not having been paid by the grantor in said deed of trust at the maturity thereof nor subsequently, and the whole amount thereof remaining due, with interest thereon,) I did, on the 2d day of May, A. D. one thousand eight hundred and seventy, within the legal hours of sale, at Waynesboro, Wayne county, State of Mississippi, at the court house door in said town, offer said lands at public outcry to the highest bidder for cash," &c. The record contains no evidence of the time, place and terms of sale, nor of the giving of the required notice, unless the recitals copied above be evidence of those facts. It will be observed that the sale was made by Houston under a naked power. The general rule is, that one, not the owner, who sells another's lands, must comply substantially with all the directions, stipulations and conditions expressed in the power, or the title will not pass.—Sugden on Powers, 212. "If notice is required to be given, the execution of the power will be void if notice be not given accordingly."

The recitals in a deed or mortgage are said to operate an estoppel against the parties to it. They do not and can not estop strangers, for strangers have nothing to do with the draught, execution, or acceptance of them. They are *res inter alios acta*, and are evidence only against the parties and their privies. In *Gibson v. Jones*, 5 Leigh, 370, the court, considering this question, said: "The defendant took it for granted the proceedings were regular. It became him to prove that they were so. The proof lay upon him, for he had the affirmative of the issue as to this point. The plaintiffs could not prove there was no advertisement." This doctrine is stated as authority in *Jones on Mortgages*, § 1830; *Williams v. Peyton*, 4 Wheat. 77, 79; *Armsby v. Tarascon*, 3 Littell, 404, 410; *Hall v. Towne*, 45 Ill. 493, 496; *Roarty v. Mitchell*, 7 Gray, 243; *Fowle v. Merrill*, 10 Allen, 350; *Sears*

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v. Livermore, 17 Iowa, 297. There was no proof in the present case that the notice required by the mortgage was given. Whether this is fatal to plaintiff's suit, or whether this is a mere informality in the execution of the power in the mortgage which the parties to it may waive, and which strangers will not be heard to object to, we need not decide.—See *Foster v. Goree*, 5 Ala. 424.

The trust deed was executed May 11th, 1866, but was not recorded until February 7th, 1870. The trustee, Houston, sold in May and conveyed December 3d, 1870. This constitutes plaintiff's chain of title. The defendant made title as follows: At the spring term of the Circuit Court of 1867, one Fail recovered a judgment against Wortham and one Farrior, on which execution was issued during that year, and returned by the sheriff, "stayed by operation of law." On the 14th November, 1867, Farrior paid Fail the amount of this judgment, and Fail thereupon transferred it to him, Farrior. Farrior was the surety of Wortham. Execution was issued on this judgment, dated April 18th, 1870, and was levied by the sheriff on the lands in controversy; and on the 4th July, 1870, the sheriff sold and conveyed the lands to Williamson, who subsequently conveyed them to Wood, defendant in this suit. It is contended for the appellant that the failure to record the trust and deed until after Fail recovered his judgment against Wortham, rendered it inoperative and void as against that judgment, and that consequently Wood's title is better than Lake's. The trust deed we have seen, was recorded February 7th, 1870, and the execution under which the sheriff sold was received by him April 21, 1870. The sale and conveyance by the sheriff was subsequent to the sale, but prior to the conveyance by the trustee. The inquiry is, did the recovery of judgment by Fail, without execution lien, constitute him a creditor, with claim superior to that conferred by the unrecorded mortgage? There is no attempt to prove notice of the trust deed given to any one, until its registration, which operated constructive notice from that date. The testimony is that part of the debt the trust deed was given to secure, was contracted contemporaneously with the execution of the deed, and the residue was to cover future advances. The sections of the Code which bear on this question are as follows:

"2166. Conveyances of unconditional estates, and mortgages, or instruments in the nature of a mortgage, of real property, to secure any debt created at the date thereof, are void as to purchasers for a valuable consideration, mortgagees and judgment creditors, having no notice thereof, unless recorded within three months from their date.

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2167. All other conveyances of real property, mortgages, or deeds of trust to secure any debts, other than those specified in the preceding section, are inoperative and void as to purchasers for a valuable consideration, mortgagees and judgment creditors, without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees, or such judgment creditors."

No argument is necessary to show that the trust deed in the present record is one of the instruments provided for in each of the sections copied above. It is an instrument in the nature of a mortgage of real property, so far as its purpose was to secure a debt created at the date of its execution; and, as to debts not created, it is a deed of trust falling within the express terms of section 2167. Such deeds, when made to secure presently contracted debts, are required to be recorded within three months from their date. When made to secure any other description of debt, it is only from the date of their registration that they are valid against purchasers for a valuable consideration, mortgagees and judgment creditors without notice. The statutes draw no distinction between purchasers for a valuable consideration, mortgagees and judgment creditors. All, alike, occupy the same vantage ground. Hence, if a purchaser for a valuable consideration is protected, a judgment creditor is equally protected. The purpose of these enactments was the prevention of frauds. They impose a very light burden on the beneficiaries under such instruments, while they render a valuable service to the public at large, in furnishing the means of ascertaining what property is, and what is incumbered by such conveyances. They are void—that is, inoperative, unless recorded as the statute prescribes. They are not technically void instruments, for they are binding on the parties, and on all persons having notice of their existence. They are only inoperative as against the classes of persons the statute was designed to protect.

Various statutes have, from time to time, been enacted in this State, requiring mortgages, deeds of trust, &c., to be recorded, all having for their object the prevention of deceit and fraud by secret conveyances. The field of operation of these enactments has been gradually enlarged. Under the act of 1823, a failure to record such instruments within the time prescribed, rendered them "void and of no effect against a subsequent *bona fide* purchaser, or a mortgagee, for a valuable consideration, not having notice thereof."—Clay's Dig. 154, § 18. This statute was confined to conveyances of real estate. The act of 1828 extended the provisions of the act of 1823 to personal as well as real property, and declared

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that such unrecorded conveyances should be void as against subsequent creditors, as well as *bona fide* purchasers without notice.—Clay's Dig. 255, § 5. These statutes were many times considered in this court, and it was ruled that the word creditor in the act of 1828, meant one having a judgment, and a lien thereunder. And inasmuch as judgments of courts of record were at that time a lien on the real estate of the defendant situated in any part of the State, it was ruled that such judgment creditor, by virtue of his judgment alone, was protected by the provisions of the statute; and if the conveyance had not been recorded within the time prescribed by law, then a judgment recovered before registration, and in ignorance of the conveyance, would have a lien paramount to that secured by the conveyance. And to render this lien available and effective, it was further ruled that the purchaser of such real estate at execution sale under such judgment, although at the time of the purchase notified actually or constructively of such conveyance, would be remitted to the paramount right of such judgment creditor, and his title would prevail over that secured by the conveyance. The rule as to personal property was different. Judgments were not liens on personal property. It required an execution in the hands of the sheriff to effect a lien on personalty, and it extended only to such property as was in the county. With this qualification, however, unrecorded conveyances, whether of real or personal property, were alike inoperative against purchasers and creditors without notice. The protection and preference were given to judgment creditors having a lien. *Cummings v. McCullough*, 5 Ala. 324; *Daniel v. Sorrells*, 9 Ala. 436; *Wallis v. Rhea & Ross*, 10 Ala. 451; S. C. 12 Ala. 646; *Jordan v. Mead*, *ib.* 247; *DeVendell v. Doe, ex dem.* 27 Ala. 156; *Fash v. Ravesties*, 32 Ala. 451.

Under the Code of 1852, the law was again changed as to "conveyances of unconditional estates, and mortgages and instruments in the nature of a mortgage of real property." These, if not recorded within the time prescribed, were declared to be void against purchasers for a valuable consideration, mortgagees and judgment creditors, having no notice thereof.—See Code of 1852, §§ 1287, 1288. These sections have not been since changed.—See Rev. Code. sections 1557, 1558; Code of 1876, sections 2166, 2167. They are copied above in this opinion. It will be seen that instead of the simple word 'creditors,' employed in the act of 1828, the Code uses the phrase 'judgment creditors.' These sections being confined to conveyances of real estate, it will be observed that the codifiers, in this change of phraseology, only expressed in terms, what this court had previously deter-

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mined was the legal import of the word 'creditor,' in the act of 1828. This was done, too, in a Code which discontinued the lien of judgment, on lands, and, as in the case of personal property, made it dependent on the fact of execution in the hands of the sheriff of the county in which the lands are situated.—Code of 1852, section 2456; Rev. Code, section 2872; Code of 1876, section 3210. On the question we are considering, the case of *Fash v. Ravesies*, 32 Ala. 451, is very like the present one. What this court said in that case in reference to the paramount lien of the execution purchaser is based on the fact that the judgment creditor had obtained a lien on the property in controversy, before the equitable mortgage was recorded, and in ignorance of its existence.

Our present statutes, however, are imperative and specific in their terms. They define the class of creditors they mean, judgment creditors, at a time when judgments were not a lien on any species of property. Perhaps the legislature, in this change, was influenced by the fact that a debt in judgment is of higher dignity than one existing in mere contract. Be this as it may, we find the statute express in its terms, and we do not feel at liberty to add provisions which the law-makers left out. It declares that such unrecorded conveyances are void as against judgment creditors "having no notice thereof," and we feel that there is left to us no room for construction. We should endanger, if not impair the usefulness of a very salutary statute, enacted to prevent fraud, if we were to travel out in search of an intention or policy not expressed or implied in the words of the statute. On the facts shown in this record, Wood's title was better than Lake's, and the Circuit Court erred in the charge given to the jury.

Reversed and remanded.

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Action for Stock Killed.

1. *Public crossing; statutory requirements as to duty of persons in charge of train.*—The statute (§ 1699, Code of 1876,) exacts certain positive duties of those in charge of a train approaching a public crossing, or other place mentioned in the statute, rendering the railroad company liable for all damage to persons or property occasioned by the failure to observe these requirements,

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and imposing on it the burden of showing compliance with the statute, if the injury occurs at one of the places therein mentioned.

2. *Same; what will not absolve from liability.*—The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employees neglected those precautions which ordinary prudence suggests as necessary to avoid casualties.

3. *Evidence; what admissible under general averment of negligence.*—Under a general averment that “the injury complained of was the result of negligence or want of skill of defendant’s employees in the management or running of the train,” &c., evidence is admissible that defendant did not have on the train a sufficient number of brakemen and servants to control it.

4. *Duty of person approaching railroad crossing.*—A traveler approaching the intersection of a railroad with a public highway, is bound to look out and listen for engines and trains; and a neglect of this duty, essentially contributory to the injury, will defeat all right of recovery for it; but he is not bound to make inquiry as to the schedules or the time when trains are expected to pass.

5. *Rate of speed; what charge as to, erroneous.*—A railroad train approaching a public crossing, must not only give the warnings and observe the other precautions required by statute, but its speed must be so slackened that the train may be more manageable in passing the crossing; and hence, a charge that the company “had a right to run its train at any speed it pleased, so that it did not endanger freight or persons on board,” asked in a suit to recover damages for injury to persons or property at a public crossing, is properly refused.

APPEAL from Jefferson Circuit Court.

Tried before Hon. WILLIAM S. MUDD.

The appellees, Thompson & Garner, brought this action against the appellant, the South & North Alabama Railroad Company, to recover damages for the killing of sixteen head of stock. The complainant avers that the killing was the result of the negligence or want of skill of defendant’s employees in the management or running of the train. From the evidence for the plaintiffs it appeared that on the 23d of November, 1875, the plaintiff Thompson and a young man were driving a drove of horses and mules, about thirty in number, along the dirt road leading from Elyton to Montevallo, and while thus driving them they crossed the track of defendant, at a public road crossing, about a mile from Brock’s Gap; and while plaintiff Thompson and the young man—the young man in front and Thompson in the rear of the drove, the two being the only persons in charge of said drove—the freight train of defendant came along at a speed of thirty or forty miles an hour over the crossing, and a little below said crossing ran over and killed two of said mules and horses, and a little further down ran over and killed other mules, and continued to run over and kill said mules and horses until the train had killed sixteen of them. It was shown that the stock killed were worth in all from \$2,160.00 to \$2,400.00; that at the point where the dirt road crossed said railroad it was not in a cut, nor on a curve, but that the grade of the railroad was a heavy down grade, for

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more than a quarter of a mile, in the direction from which the train came. Thompson testified that he had crossed the railroad several times on the day of the accident, and that he had instructed the young man to listen for trains, and that when they arrived at the place where the accident occurred, the young man did stop and appeared to be listening; that he, witness, also listened, but heard no train until it turned the curve, about three hundred yards from the crossing, and that he did not hear the bell ring or the whistle blow until the train turned the curve; that the bell did not ring, or the whistle blow until the train was within one hundred or one hundred and fifty yards of the stock, when the whistle was blown; that he could not discover that the speed of the train was at all reduced. The plaintiff's testimony also tended to show that the engine was not reversed or the brakes applied. It was shown that the accident occurred on a clear, still day. Further testimony for the plaintiff tended to show that the employes in charge of the train were intoxicated and had been running it at a dangerous rate of speed and in a reckless manner all the way from Decatur to where the accident occurred. There was also evidence for the plaintiff tending to show that the train which caused the accident, and which was a large one, consisting of nineteen loaded cars, did not have sufficient hands or brakemen on board to control it, there being only three brakemen on said train, and the fireman who had charge of a brake on the engine. For the defendant it was in evidence that for at least one-fourth of a mile before reaching said crossing, near where the plaintiffs' stock was killed, the engineer blew his whistle and rang his bell, and continued to blow such whistle and ring such bell until the train had passed the crossing; that it was not possible to see the stock on the track till his engine turned the curve, about three hundred yards from the place where the accident occurred; that as soon as the stock were perceived, the cattle alarm was sounded, the brakes applied, and the engine reversed, and all means known to skillful men were used to stop said train. It was further in evidence that the engineer, fireman, conductor and brakemen were all perfectly sober and competent in every respect for their respective places; that on a clear, still day, such as that on which the accident occurred, and in the locality, the noise of a train could be heard from half a mile to a mile and a half; that with a train such as the one which caused the accident, and down such a grade as there was at the place, it was impossible to stop the train in less than eight or nine hundred yards; and that at the time the accident occurred the train of defendant was in

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charge of a new set of employes, who had taken charge of it at Birmingham, and was being prudently and carefully run at a speed not exceeding eighteen miles an hour; that the plaintiffs passed through Birmingham with their stock on the day it was killed, and by applying at the office of the company there, could have learned the schedule of the trains, and thereby avoided the accident, but that such train was ten or fifteen minutes behind its schedule time when the accident occurred. It was also shown that there were on said train all the necessary appliances for checking or stopping it, which are ever used on a freight train.

This was in substance all the evidence, and the court in its general charge instructed the jury, "that if they believed, from the evidence, that plaintiffs had stock killed on the railroad track of defendant by its cars, locomotives, and engines, being operated at the time by the defendant, through its employes, on or about the 23d day of November, 1875, that said stock was of value, then they must find for the plaintiffs and assess their damages at the value of the stock at the time they were killed, with interest thereon from the date of said killing, at eight per cent., till the time of the trial, unless they should further find from the evidence that said stock were not killed through any want of care and skill on the part of defendant's employes; that if defendants employes were not guilty of any negligence, but rang the bell or blew the whistle at least one-fourth mile before reaching said public road crossing, near which the stock were killed, and continued to ring said bell or to blow said whistle at intervals till said train had passed said crossing, and that upon perceiving plaintiffs' stock on the track the engineer gave the cattle alarm, blew on brakes, reversed his engine, and did all in his power known to skillful engineers to slow or stop said train, and that the fireman and brakemen put on brakes as fast and as well as they could, and did all in their power to stop said train, then the plaintiff would not be entitled to recover, and they must return a verdict for the defendant; but the burden was on the defendant to show that it was not guilty of any negligence."

The plaintiffs then requested the following written charges: "When the damage in a case like this is done at a crossing of the dirt road and railroad, the railroad company cannot excuse itself by simply showing that it complied with the requirements of the statute, unless it also appears from the testimony that the company used care and prudence in other respects." The court gave said charge and the defendant excepted.

The defendant then requested the following written

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charges: 1. Under the pleading in this case the jury will not be authorized to consider and decide upon the sufficiency of the force on the freight train that did the killing; if the hands and employees on said train were not guilty of any negligence, but did all in their power, and used all the means and appliances known to men skilled in their respective employments, to slow or stop the train, this is sufficient and the plaintiff cannot recover. 2. If the jury believe from the evidence that the employes of defendant rang the bell or blew the whistle at least one-fourth of a mile before reaching the public road crossing, (the first one to be reached by the train), near which the plaintiffs' stock were killed, and continued to ring said bell or blow said whistle at intervals until the train passed said crossings, and that on perceiving plaintiffs' stock on the track of the railroad, said employees did all in their power to slow or stop said train, known to men skilled in the employment of engineers and brakemen, and that plaintiffs contributed partly to the killing of said stock by failing to listen for the approach of said train, or that being able to ascertain when the train would pass said crossing, failed and neglected to do so, and that by such a precaution the killing of the stock would have been avoided, then the defendant is not liable in this action, and the plaintiffs cannot recover. 3. If the jury believe from the evidence that the defendant, through its employees, the engineer having control of the locomotive of the freight train that killed the stock, rung the bell and blew the whistle at least one-fourth of a mile before reaching the public road crossing, (the first one to be reached by the train near which the stock were killed), and continued to ring said bell or blow said whistle at intervals, until the train passed said public road crossing, and that on perceiving the plaintiffs' stock on the track of the railroad, said engineer used all the means within his power known to skillful engineers, such as the application of his brakes, and the reversal of his engine, in order to slow or stop the train, and that the brakemen did all in their power to slow or stop said train, then the plaintiffs are not entitled to recover, although the jury should further find from the evidence that said train, when it approached said crossing, but before the stock could be seen by said engineer, was being run at a much higher speed than fifteen miles an hour; for the defendant had the right to run its trains at any rate of speed it pleased, so that it did not endanger the freight or persons on board of said train."

The court refused each of said charges, and the defendant separately excepted. There was a verdict and judgment in favor of the plaintiff for the sum of twenty-four hundred and

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ninety-eight dollars. From this judgment the defendant appeals to this court, assigning as error the charges given and the refusal to charge as requested.

HEWITT & WALKER, and TERRY & LANE, for appellant.

PORTER & MARTIN, *contra*.

BRICKELL, C. J.—1. The statutes make certain positive regulations a railroad company, its engineer or other person having the control of the running of its locomotives, must observe before reaching any public road crossing, or any depot or stopping place on such road, and until such road crossing is passed, and until he reaches such depot or stopping place. There are other places specified in the statutes at which certain regulations must be observed.—Code of 1876, § 169*3*. The engineer or other person having control of the running of a locomotive, who does not observe these regulations, is subject to indictment and punishment for a misdemeanor.—Code of 1876, § 4256. The railroad company is declared liable for all damages done to persons, stock, or other property, caused by a failure to observe these regulations, or by any negligence on the part of the company or its agents. In any suit for injuries to property “the burden of proof is on the railroad company,” to show that these regulations were observed, if the injury occurred at any one of the places mentioned in the statute.—Code of 1876, § 1700; *M. & O. R. R. Co. v. Williams*, 53 Ala. 595.

2. The injuries to property, which are the subject of the present suit, occurred at the intersection of the road of the appellant with a public road in Jefferson county. The Circuit Court instructed the jury, that an observance by the appellant or its servants or agents of the statutory regulations, did not excuse from liability, if in other respects there was negligence. This was the substance, though not the language of the instruction, and we do not think it objectionable. Such is the fair construction of the words of the statute, which renders the company liable if these statutory regulations are not observed, but declares in addition, a liability *for any negligence on the part of such company or its agents*. If these words were not found in the statute, it would not be a fair construction that would absolve the company from responsibility, because it observed the statutory regulations, and yet neglected other precautions which ordinary prudence would suggest as necessary to avoid casualties.

3. The first instruction requested, proceeds on the ground, that evidence that there was not on the train of cars causing

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the injury, a sufficient force to manage and control it, was inadmissible under the averments of the complaint. The complaint contains two counts, neither of which aver any special acts or omissions as constituting negligence. Each count contains the general averment that the injury complained of, "was the result of the negligence or want of skill of defendant's employes in the management or running of said train, locomotive, or cars." Under our statutes, "all pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts or matter to be put in issue in an intelligible form." "Any pleading which conforms substantially to the forms attached" to the Code, "is sufficient." The forms consist of general allegations of legal conclusions, rather than a statement of the particular facts which will support them. Generally, negligence is a mixed question of law and fact, and it would not comport with our system of pleading, to require that a party complaining of it, should aver each particular fact or circumstance which contributes to prove it. No such particularity is found in any of the forms of complaint attached, in kindred actions, and it would be a departure from the statute to require it in one particular class of actions.

4. It is the duty of travelers approaching the intersection of a railroad with a public highway to look out and listen for trains or engines; and a neglect of the duty contributing to an injury, will avoid all right of recovery for it.—*N. P. R. R. Co. v. Hirleman*, 49 Penn. 60. The second charge requested asserts a much broader and larger legal proposition. It asserts that if, by inquiry, travelers could ascertain when trains would pass such crossings, and if such inquiries had been made, an injury would have been avoided, the failure to make them is contributory negligence. No authority has been cited in support of this proposition. It is not the duty of travelers, or of any person in the proper use of a public highway, to make any such inquiry. They have a right to rely on a compliance with the statutory regulations, and on the appearances of the railroad track, at the time they are approaching or crossing. If they are then diligent, watching and listening for trains, the duty they owe to the railroad company is performed.

5. The third charge requested, was properly refused, because it asserted that the appellant had the right to run its train "at any speed it pleased, so that it did not endanger the freight or persons on board of said train." When a train is approaching the intersection of a public highway, there are other duties which must be observed, than such as relate merely to the safety of the freight and persons on

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board the train. The public at large have rights to the use of the highway equal in degree to any to which the railroad company is entitled. It is a duty to the public having the right to the use of the highway, that not only the warnings of the approach of the train, the statutes prescribe, should be given, but that the speed of the train should be slackened, so that it would be more manageable, and collisions with persons or property crossing the track may be more easily avoided.—Whart. Neg. § 804; *M. & C. R. R. Co. v. Lyon*, MSS.

We find no error in the record, and the judgment must be affirmed.

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Action to subject Statutory Estate of Wife for Necessaries.

1. *Single account; what constitutes.*—Where an indebtedness is contracted with a merchant, most of the articles furnished being purchased by the husband, and the account runs through several years, some of the items being such as the statutory estate of the wife is liable for; others for expenses incurred in cultivating the lands composing the separate estate of the wife; others for the expenses of a partnership plantation carried on by the husband and a third person, and still others for the personal expenses of the husband; and this account is kept as one continuous running account on the books of the merchant, such account constitutes but one debt, for the whole of which the husband is liable; and but one suit can be maintained against him for its recovery.

2. *Statutory separate estate of wife; tenure and incidents of.*—Under our statutes the separate estate of the wife is her property and is not liable for the debts of the husband; it vests in the husband, with the right to manage and control and receive the rents, incomes and profits without accountability; but these rents and profits are not liable for his debts. Either husband or wife, by purchasing articles of comfort and support for the family, and for the tuition of the wife's children, suitable to their degree and condition in life, may make the corpus of the wife's estate liable therefor; but beyond this, neither husband or wife can make such estate liable for any debt.

3. *Statutory separate estate of wife; rents, incomes and profits of; how husband takes.*—The rents and profits of the wife's estate pass to the husband as trustee, and they are thus bestowed in confidence that he will use them for the support of the family; but this is only a moral duty, to the performance of which he cannot be compelled by any legal remedies, though he might be removed from the trust for a clear violation of this duty, in which event the wife would, as to such estate, be reinvested with all the rights of a *femme sole*.

4. *Same; what proper application of.*—The payment by the husband out of the rents, incomes and profits of the wife's estate, derived from the cultivation of her plantation, of a debt for supplies, which were necessary and which had been used in the production of a crop, is not a breach of the duty resting on him to apply the proceeds of her estate to the support of the family.

5. *Statutory estate of wife; for what liable.*—Where the husband has an account with a merchant, running through several years, some of the items of which

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render the estate of the wife liable for their payment, and others impose no liability on her estate, and the husband each year makes payments with the rents of her estate, directing the payments of each year to be applied to the account of the year in which they are made,—such payment extinguishes so much of the debt as was first incurred, without regard to the class of articles of which it was composed. If, of the balance remaining after such payments, any part is composed of articles for the support and maintenance of the family, the corpus of the wife's estate is liable for the amount of such necessities, and may be sold to enforce payment.

APPEAL from Sumter Circuit Court.

Tried before Hon. LUTHER R. SMITH.

The appellee, A. Tannenbaum, brought this action against the appellants, I. James Lee and Susan L. Lee, and sought to subject certain lands, the statutory separate estate of Mrs. Lee, to the payment of an account due to him. On the trial of the cause there was evidence tending to show the correctness of the account sued on, and that Mrs. Lee had owned the property sought to be condemned from the date of the commencement of the account continuously to the time of the trial. It was shown that I. James Lee and his family lived in good style and enjoyed the comforts of a pleasant home, residing on the lands sought to be subjected.

During the time of the running of these accounts various payments had been made; all of which, as the proof showed, were made with cotton or the proceeds of cotton, the rents, incomes and profits of the lands, constituting the statutory separate estate of Mrs. Lee.

The articles furnished, most of which were bought by I. James Lee, and which the evidence tends to show were primarily charged to him, were shown to be partly for the use of Lee and wife for family purposes, partly for crop expenses in growing crops on the lands of Mrs. Lee, partly for expenses in raising a crop on lands which Lee cultivated in partnership with another person, and partly for the individual expenses of said I. James Lee. There was conflicting evidence as to whether the defendant, I. James Lee, in forwarding the cotton, directed how the application of the payment should be made, and there was conflicting evidence as to the manner in which the payments were applied by the appellee. There was proof tending to show that if the application of the payments in cotton and other income from the separate estate of Mrs. Lee, had been made to those matters of indebtedness which were for family supplies, for which her separate statutory estate would have been liable, such indebtedness would have been entirely discharged. There was also proof that the payments of each year were ordered to be applied to the account of that year. It was also shown that the payments were entered as credits on the

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running account, as the same accrued in point of time. It was proved that there was a suit brought by B. M. Emanuel, in his own name, in the year 1876, against Lee and wife for store account, from the 1st of February, 1875, and recovery had by him thereon, which was paid; that the items of account sued on were entered on the same account book continually, without any change, saving the drawing of a line between the last article in January and the succeeding one in February. There was also proof tending to show that on the 1st of February, the plaintiff turned over the business and stock in trade to said Emanuel, who had previously acted as his agent, and that the account sued on in the present action was for articles furnished continuously up to a very few days before the first entry after the 1st of February, 1875.

I. James Lee testified that in the year 1873 the said Emanuel, agent of said Tannenbaum, made a statement of accounts in writing to him, showing a different account from the one sued on, the application of credits being made generally and not as the account now exhibited, being divided between an account for family supplies and an account for plantation expenses, with credits applied first to the latter. The rent notes of tenants for the year 1874, for the separate estate lands, had been assigned by endorsement to plaintiff, both Lee and wife joining in the endorsement, and Emanuel, as agent for plaintiff, had collected part of these notes, but the evidence was conflicting as to whether these notes were transferred as a basis for future credit, or as a payment *pro tanto* of previous indebtedness. The account sued on is charged to "Col. I. James Lee, and wife, Susan L. Lee," and the first charge thereon is of date February 1, 1870, and the last on the 24th of December, 1874; yearly credits for each being given separately, and a balance struck. The account presented to I. James Lee in 1873 was charged to Col. I. James Lee, and was for the same articles as the account sued on.

Upon this evidence the court charged the jury, among other things, "that the debtor had the right to determine to which debt the credit should be applied. The debtor failing to direct, the creditor may apply it; if he fails to apply it the law will apply the credits to the oldest debts; therefore if the jury believe from the evidence that the defendants failed to direct the application of the credits, then the plaintiff had the right to appropriate the same to either of the accounts that he desired to apply it, and if he did so, he did that which the law permitted him to do. Nor does it make any difference that the credit applied was the income of the

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wife's separate estate, because he is entitled in his own right to the rents and profits arising from her separate statutory estate." To the giving of that part of the charge which asserts the husband is entitled in his own right to the rents, incomes and profits arising from his wife's separate estate, and had the right of applying them as he thought proper, the defendants excepted.

The defendants then asked the court to give each of the following written charges to the jury: 1. "If the jury find that the transactions between Tannenbaum and I. James Lee were kept in one account, without any change in the books or otherwise, of which Lee and wife had notice, and that a part of the account had been sued on, a judgment rendered and that judgment satisfied, then the plaintiff can not recover as to the balance. 2. If the jury find that notice was delivered, and cash paid to the plaintiff, or to his order, as a credit on a running account, notwithstanding some items were for "family supplies" and some for articles for which the separate estate is not liable, and that the produce and cash so delivered and paid as credits were part of the separate estate of Mrs. Lee, or proceeds thereof, and that the plaintiff knew this; then the law will not apply these credits, first to the satisfaction of the account for which Mrs. Lee's separate estate is liable, (on which there was a lien), then they must first credit these accounts on the claim against the separate estate, and if these credits equaled the amounts of the accounts for family supplies, they must find for the defendant, Mrs. Lee. 3. The rule as to the application of credits is, that the debtor may direct their application; if he does not do so the law applies such payments to the oldest claim; if, therefore, the jury find that the credits made were ordered to be applied to each year's purchases respectively, then they must so apply these credits, and if they find that these credits cover the articles due for comfort and support of the household, each year respectively, then they must find for the defendant, Mrs. Lee. 3. If the jury find that the plaintiff entered the credits, received from the defendant Lee in the running account, in point of time, then they are to be applied to the account due before the date of the credits, and they must so apply them, irrespective as to whether the antecedent accounts were for family supplies or other. 5. In the absence of an express agreement to the contrary, when property is subject to a mortgage or other lien, and such property is delivered to the mortgagee or to the person holding such lien, the law applies such property to the satisfaction of the debt so subject to the lien. If, therefore, the jury find that the income of Mrs. Lee's sepa-

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rate estate was paid to an extent sufficient to cover the amount of the account for articles of comfort and support, then they must find for the defendant. 6. If the jury find from the evidence that the plaintiff in this case, in the year 1873, made a statement in writing of account to the defendant, I. James Lee, showing an application of credits by the plaintiff, the plaintiff cannot, by a readjustment of accounts, defeat the application of the payment to the items of the account, as shown by said statement, without the consent of the defendant. 7. The husband holds the rents, incomes and profits of the estate of the wife in subordination to the great purpose of providing a maintenance for the family. If the jury find from the evidence that the plaintiff in this case has received from the husband, during the years for which the account sued on was contracted, from the proceeds of the crop raised, a sum greater in amount than the supplies furnished for the support of the family, they cannot condemn any part of the wife's property in these proceedings. 8. It was the duty of the plaintiff to have applied the property of the wife to the wife's liability, and not to the individual liability of the husband, and if the jury believe from the evidence that the property of Mrs. Lee was sufficient to pay any liability on her estate, they cannot subject it, her separate estate, and they must find it not liable." The court refused to give each of the charges, and the defendants separately excepted to the refusal of each. There was a jury and verdict for the plaintiff, and his damages, as against I. James Lee, were assessed at fifteen hundred dollars, and the separate estate of Mrs. Lee found liable for seven hundred dollars of that amount. The defendants appeal from this judgment, assigning as error the charge given and the refusals to charge as requested.

THOMAS COBBS, and SNEDECOR & COCKRELL, for appellant. If it be true, as settled by the decisions of this court, that the husband holds the income of the statutory separate estate of his wife in subordination to the great purposes of maintaining the family, then in paying an account against himself, or against himself and wife—consisting of items creating a charge on the corpus of that estate, and items of individual charge against the husband—neither the husband alone, nor the husband and creditor consenting thereto, can make such an application of the income as, in effect, pays those items for which the husband alone is responsible, and leaves unpaid those items which create a charge on the corpus of his wife's statutory separate estate. The husband does not hold *in his own right* the income of the wife's statu-

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tory separate estate. In the language of this court in *Eskridge v. Ditmars*, 51 Ala. 254, the income is not a gift to the husband; he takes it as trustee, as the head of the family, to be applied to the comfortable support of the family. The purpose of the statute was to preserve the corpus of the wife's separate estate from the dominion of the husband, as a means of support to the wife and children. The charge of the court was in direct conflict with these views. It is certain that the source or fund from which a judgment is derived, will direct its appropriation.—*Webster v. Singley*, 53 Ala. 210.

THOMAS B. WETMORE, and JAMES COBBS, for appellees.—The theory that the appellants insist upon, in regard to the husband's right to the income of the wife's statutory separate estate, would set at naught the statute, which gives immunity to the husband for his use of the income, and if established as a principle, would enable the wife to sue and recover back any income of her estate, paid out by her husband for any but her separate debt. The income of the wife's separate estate belongs to the husband, and to the husband alone; he has the right to dispose of it as he sees fit. If he pays his individual debt with it, no one has the right to complain. The wife cannot, for the statute has expressly exempted him from liability to account to her. And she cannot complain, if he, in defiance of his duty of supporting the family, uses the money to pay his individual debt. The statute provides an ample remedy for her, if the husband abuses his trust, by a bill for his removal from his trust. She cannot impeach his disposition of the income.

STONE, J.—The present record raises some new questions respecting the liability of the wife's statutory separate estate for articles of comfort and support of the household. Mrs. Lee was the owner of real estate, made her separate property by statute. An account for merchandise was contracted with the appellee—the purchases being made mostly by Mr. Lee, the husband—running through several years, and swelling in the aggregate to a considerable sum. Some of the items composing this account, fall within the classes which section 2711 of the Code of 1876 declares "the separate estate of the wife is liable for." Other items were for the subsistence and support of the wife's plantation and the laborers thereon. The application of the income and profits of this plantation, so supplied and kept up, is the most material inquiry in this cause. Still, other items of the account were for use of Mr. Lee, the husband, and for the support of

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another plantation, which the husband was cultivating in partnership with a third person. The account, though embracing these several classes of items, was kept on the books of appellee as one continuous running account, and the tendency of the proof is, that it was primarily charged against I. James Lee, the husband. This, however, is unimportant, as, if it was charged against I. James Lee and Susan L. Lee, his wife, it was and would be still, one continuous account. This account was the debt of I. James Lee—was one single debt, and not two debts. Hence, in suing Lee for its recovery, it could not be split up, and two or more actions maintained upon it.—*South & North Alabama Railroad Co. v. Henlein & Barr*, 56 Ala. 368, and authorities cited. There being in this case only one debt, it follows that all the doctrine about the application of payments or credits had nothing to do with the case, and could have had no other effect than to confuse the minds of the jury, in considering the true questions involved.

The estate of a married woman, made separate by statute, and the husband's rights in and powers over it, are the result of our statutes, and are unlike those of any other State of which we have knowledge. It is her separate estate, not subject to the payment of the debts of the husband. It vests in the husband as her trustee, who has the right to manage and control the same, without liability to account with the wife, her heirs or legal representatives, for its rents, income and profits; but such rents, income and profits are not subject to the debts of the husband. The proceeds of such separate estate may be used by the husband in such manner as is most beneficial for the wife; and he may invest them for her benefit. He or she, by purchasing articles of comfort and support of the household, and for tuition of the children of the wife, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, make the corpus of the wife's estate liable therefor; but beyond this, neither husband or wife can make her statutory estate liable for any debt.—Code of 1876, sections 2705, 2706, 2709, 2711. The wife may make a valid will without the concurrence or approbation of her husband.—Section 2713. It will thus be seen that the right and title to property thus situated is secured to the wife, yet without power in her to charge it, save to a limited extent; that the husband has neither right or title to the property, yet, as trustee, may manage and control it, and invest its proceeds, when in money or converted into money; that the rents, income and profits pass to him as trustee, but there is no mode provided for making him account for them;

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and yet, they are not liable to his debts. True, the rents, income and profits are committed to him in confidence that he will employ them in support and maintenance of the family; but this is only a moral, or imperfect duty. Its performance cannot be compelled, though, he might be removed from the trust, for a clear disregard of this obligation. The wife would then, as to this property, become reinvested with all the rights of a *femme sole*.—Sections 2717, 2718; *Murphree v. Singleton*, 37 Ala. 412; *Patterson v. Flanagan*, *ib.* 513; *Dent v. Slough*, 40 Ala. 518; *Smyth v. Oliver*, 31 Ala. 39; *Whitman v. Abernathy*, 33 Ala. 154; *Hayes v. Cockrell*, 41 Ala. 75; *Rogers v. Boyd*, 33 Ala. 175; *Warfield v. Ravisies*, 38 Ala. 518; *Alexander v. Saulsbury*, 37 Ala. 375; *Reel v. Overall*, 39 Ala. 138; *Bibb v. Pope*, 43 Ala. 190; *Parker v. Dillard & Jones*, 50 Ala. 14; *Fry v. Hamner*, *ib.* 52; *Riley v. Pierce*, *ib.* 93; *Wright v. Merriwether*, 51 Ala. 183; *Eskridge v. Ditmars*, *ib.* 245; *Davidson v. Lanier*, *ib.* 318, *Cowles v. Pollard*, *ib.* 445; *Northington v. Faber*, 52 Ala. 45; *Marks v. Cowles*, 53 Ala. 499; *Smyley v. Reese*, *ib.* 89; *Carleton v. Rivers*, 54 Ala. 467; *Bender v. Meyer*, 55 Ala. 576; *Janney v. Buell*, *ib.* 408; *Wright v. Preston*, *ib.* 570; *Coleman v. Smith*, *ib.* 369; *Wright v. Rice*, 56 Ala. 43; *Howard v. Daughtie*, *ib.* 511; *Schuessler v. Wilson*, *ib.* 516; *McDonatd v. Mobile Life Ins. Co.* *ib.* 468; *Strong v. Waddell*, *ib.* 471; *Smith v. Carson*, *ib.* 456; *Connor v. Williams*, 57 Ala. 131; *Mitchell v. Dillard*, *ib.* 317; *Bell v. Locke*, *ib.* 242; *Holliday v. Jones*, *ib.* 525; *Jones v. Wilson*, *ib.* 122; *Peeples v. Stolla*, *ib.* 53; *Williams v. Bass*, *ib.* 487; *Williams v. Auerbach*, *ib.* 90; *Milhouse v. Weeden*, *ib.* 502; *Prout v. Hoge*, *ib.* 29; *Sterrett v. Coleman*, *ib.* 172; *Abrahams v. Chapman*, 61 Ala. 108.

We said above that there were not two debts in this case, and there is, therefore, no field of operation for the principles of law which regulate the application of credits, when the parties themselves fail to make the application. We dismiss that subject without further consideration.

It is certainly the moral duty of the husband to preserve and keep the corpus of the wife's statutory estate; and, to this end, he should not squander, or misapply the rents, income and profits, to the neglect of the high duty resting on him to furnish support and maintenance for his family. Should he do so, the Court of Chancery would be authorized to remove him from the trust, on a proper application and proof. But, when the income and profits are derived from a plantation, and supplies had been furnished which were necessary, and contributed to the production of the crop, then payment by the trustee for such supplies, out of the income and profits, would not only not be a breach of his duty

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as trustee, but would be a praiseworthy act. Debts ought to be paid, and I confess myself no advocate of a system, legislative or judicial, which enables parties to hold property, and bid defiance to their too confiding creditors. In cases like the present, the law has not, in terms, declared how such payments, as are shown in this record, shall be applied. The bill of exceptions state that Mr. Lee gave direction that each payment should be applied to the account of the year in which it was made. This direction, if given, should have been followed. But, if such payments did not liquidate the entire account of the year, how stands the unpaid balance? Has a particular class of items been paid, and another class been left unpaid? There is nothing in the law, nor in the facts we have supposed, which authorize any such assumption. The only just solution we can give of this question, is to hold that a partial payment extinguishes so much of the debt, or legal liability, as was first incurred in the order of time, without any reference to the class of articles of which it is composed. This would leave the remaining, or last part of the account unpaid; and if any portion, or the whole of such unpaid balance was for articles of comfort and support of the household, under section 2711 of the Code of 1876, then, to that extent and no further, would the separate estate of the wife be liable therefor. This we declare to be the true rule, in cases like the present, of blended account, and partial payment.

Several of the rulings of the Circuit Court are not reconcilable with these views.

The court did not err in refusing to give the charge asked, numbered 1. It did not postulate enough to show the entire account was the property of one and the same person. Everything therein supposed may be true, and yet the entire interest in the merchandise may have changed hands on the first February.

Judgment reversed and cause remanded.

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Settlement of Estate in Probate Court.

1. *Will; construed.*—The testator, who seems to have owned quite a large estate, both real and personal, commenced the preparation of his will on the 2d day of February, 1838, and on that day inserted a clause by which he gave to his wife Sarah certain tracts of land, and stock, provisions, and "all my negroes, both male and female, with the following restrictions, that is to say: That as my children become of age or marry, they are to have two grown negroes each, and as many more as my wife may think proper to give. I mean, when I say stock and furniture of all kinds, horses, cows, hogs, carriages, wagons, plantation tools, and everything as it is now—all during her life or widowhood; but if she should marry or die, then and in that case, it is my will that all the property I have left her should be sold." This clause then forbids the negroes being sold separately, &c., and continues, "and this [I] enjoin on my beloved wife, in case she does not [marry], and, in case she marries, she is to have ten thousand dollars, to be paid her by my executors, to do as she pleases with." The will was not completed on that day, and, three days afterwards, February 5th, 1838, the testator added this clause: "Being still in my proper senses, and on a further consideration of all the matters and things, I have thought proper to alter a part of the first part of my will—that is, that in case my beloved wife never marries, I wish for her to have five thousand dollars' worth of property left her her life time, or widowhood, she having choice of it, to be hers forever, to do as she may think proper with. And, further, by Mr. Aaron Ready, putting in what I have given him heretofore, and his having rendered services which the others could not do, I give him, extra, two thousand dollars. Now, in explanation of this will, as it is done just on my starting to New York, and in a hurry, my will is that the five thousand dollars may be taken out of what I give my beloved wife, and the two thousand dollars extra, which I give to Aaron Ready." On the same day, the will was duly executed and attested.

Testator died in the year 1840, and his will was duly probated the same year.

Aaron Ready and one Banks qualified and acted as executors until the year 1852, when both died. They made several partial settlements, and the estate was finally settled by an administrator *de bonis non*, in 1863, except as to the reversionary interest in the property given to Mrs. Sims. She died in the year 1874, without having married again. The appellee was appointed administrator *de bonis non*, and, within less than three years after Mrs. Sims' death, paid the amount of the legacy to Ready to his personal representatives.

Held: 1. The clause of February 5th must be treated and construed as a codicil to that part of the will written before that time, but not as revoking or abrogating the first clause further than necessary to give effect to its terms. 2. The bequest to Ready was demandable after the expiration of eighteen months from the probate of the will, and not postponed until the death of Mrs. S., and, having been allowed to remain unpaid for more than twenty years, became a stale demand, which the administrator *de bonis non* paid on his own wrong, and for which he is not entitled to credit in his settlement.

APPEAL from Tuskaloosa Probate Court.

This was an appeal from a decree on final settlement of the estate of Edward Sims, by the appellee, Frank S. Moody,

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administrator *de bonis non*. The principal question involved was the rightfulness of a payment made in the year 1874 by the administrator *de bonis non*, of a legacy given by Sims' will to one Ready. The provisions of the will are fully stated in the opinion. Testator died in the year 1840, and his will was duly probated in the same year. Ready and one Banks qualified and acted executors until 1852, when both died. They made several partial settlements, and the estate was finally settled by an administrator *de bonis non* in 1863, except as to the reversionary interest in the property given Mrs. Sims. She died in the year 1874, without having married again. Appellee was appointed administrator *de bonis non*, and within less than three years after Mrs. Sims' death, paid the Ready legacy to his personal representative, and the Probate Court allowed the same as a rightful payment by the administrator; and from that decree this appeal is prosecuted.

B. B. LEWIS, for appellant.—The will admits of no other construction than that the two thousand dollars left Aaron Ready was a pecuniary demonstrative legacy.—33 Ala. 85; 42 Ala. 16; 47 Ala. 554; 4 Harris, 281. The law looks with favor on such legacies, and they have a prior right to the fund out of which it is directed to be paid, as against all other claims except those of creditors.—Redfield on Wills, pp. 462-469, §§ 10, 18. At the same time and in the same clause of the will, testator gives his wife \$5,000, to do with as she thinks proper, and, to do this, he alters a part of the first part of his will, and says these legacies are to be taken out of what I give my beloved wife. The first part of his will had given a life estate to his wife in certain property. When could she take this property out? Certainly as soon as it was found it would not be wanted to satisfy the demands of creditors; and Ready could at the same time have demanded and recovered his legacy, given in the same clause. A demonstrative legacy is a charge upon the property out of which it is to be raised, and will be raised as soon as practicable, unless made payable in the future by the terms of the will. *Fry v. Fry*, 7 Paige. In pecuniary bequests to individuals, without specifying the periods when the money is to be received, it is payable at the end of a year, in England, and at the end of eighteen months in Alabama, next after the testator's death—Roper on Legacies, 552; 2 Williams on Exr's, 958. Pecuniary legacies payable generally, are regarded as due at the expiration of eighteen months after the death of the testator.—6 Porter, 518; 13 Ala. 557; 1 Edwards' Ch. 187; Phillips on Evidence, vol. 1, 684. After the lapse of eighteen months, twenty years are sufficient to raise

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presumption of payment of the legacy.—40 Ala. 171; *Austin v. Jordan*, 35 Ala. —; 1 Johnson Ch. 46; 4 Washington C. C. 639; 2 Vesey, jr. 272; 1 Hall, 594. The administrator is not allowed to pay a claim he could have resisted.—32 Ala. 245.

WATTS & SONS, and FRANK H. MOODY, *contra*.—In construing a will, effect must be given, if possible, to the whole will, and it must be construed so that no legacy will encroach on any other; and greater latitude of construction is allowed when, as in this case, the will was evidently drawn by an unskilful, inartificial hand.—5 Ala. 148; 26 Ala. 726; 27 Ala. 127. The payment of the legacy, before the widow's death, would have encroached upon her right; and, consequently, the payment was postponed until her death. But even if the court should doubt as to what is the proper construction of this will, still it must decide in favor of the appellee; for the appellant and all the legatees, in construing the will immediately after the death of the testator, united with Ready in construing the will so as to make his legacy payable only after the death of the widow. The concurrence of all the legatees in this construction, united with his own convictions, caused Ready not to claim his legacy. The case of *Colbert v. Daniel*, 32 Ala. 323, is conclusive of this case. This construction, adopted by the original executors, upon conference with the legatees themselves, was acted on by Ready, and by those who followed him in the administration. For two generations no one doubted that such was the right construction; and under that construction the parties acted, and rights honestly accrued. This, then, became the prescriptive interpretation of the will, and all parties to it are bound by it. No court will unsettle such a construction, and change it, by a technical exposition of this part of the will, even if the court should incline to think that possibly the technicality was against the administrator. But even if this construction of the will be wrong, it does not follow that the payment of the legacy was improperly paid. The several executors and administrators held this property, after the death of the widow, under an express trust, against which the statute of limitations does not run.—32 Ala. 314; 33 Ala. 57. The statute of limitations is not applicable to legacies.—Code of 1876, §§ 3223-3231; 40 Ala. 171; 2 Watts, 161. Finally, if there was a limitation, the administrator could not be held responsible for refusing to defeat the admitted will of the testator by setting up the technical plea. An executor may refuse to plead the statute of limitations. 9 Ala. 502; 20 Ala. 147. And, by analogy, he may refuse to

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plead a prescriptive limitation. The two species of limitation are founded on the same theory, have the same object in view, and their operation and effect are governed by the same general principles. They are both intended to produce repose, and are both based on the presumption of payment. 8 Porter, 211; 46 Ala. 538.

STONE, J.—Rules by which wills are construed are well defined. The several clauses must be construed together, as constituting one instrument; the construction of one clause is frequently aided by consulting another; in case of repugnancy, real or apparent, the general intent is to be carried out, rather than the special; the intention of the testator, if lawful, to be gathered from the language of the will, is to be carried into effect; and, in case of irreconcilable conflict between two clauses, the last is to prevail, as being the latest expression of the testator's will. It is upon this last principle that codicils, as far as they express an intention different from the will, are to prevail. But they displace and supersede the will, only to the extent expressed, or to the extent the two can not stand and be executed together. The will and codicil are one instrument for purposes of construction, and must be read as if they were executed at one and the same time, except that clauses in the will that are expressly revoked in the codicil, and clauses that are irreconcilably repugnant to provisions in the codicil, must be treated as if stricken out. This is the purpose—this the office of the codicil.—*Hitchcock v. U. S. Bank of Penn.* 7 Ala. 386; *Mason v. Smith*, 49 Ala. 71; *Hunter v. Green*, 22 Ala. 329; 1 Jar. on Wills, 411.

The question, in the present case, arises on the construction of Edward Sims' will. The clause is that which gives to Aaron Ready a pecuniary legacy of two thousand dollars. If the payment of that legacy was postponed, by the terms of the will, until after the death of Mrs. Sims, widow and relict of testator, then there can be no question that Moody, the administrator, was rightly allowed a credit for its payment. Mrs. Sims died in 1874, and the payment was made in less than three years afterwards; probably less than two. It is manifest that the period necessary to perfect a bar of a pecuniary legacy, is much longer than that. On the other hand, it is contended by appellant that the provisions of the will do not postpone the payment of this legacy, and that, consequently, it was due and demandable at the end of eighteen months after the probate of the will. The will was probated in 1840—more than thirty-three years before the death of Mrs. Sims. Aaron Ready, the legatee, was one of

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the executors of the will, and acted in that capacity until his death in 1852. Two presumptions are claimed as barring this legacy, demanded and paid, as it was, after 1874. First, that Ready, being executor for eleven or twelve years, and having assets in his hands, is presumed to have paid himself. Second, that twenty, even more than thirty years had elapsed since the legacy was demandable, and the law presumes its payment. If this legacy was due at the end of eighteen months after the will was probated, then we do not hesitate to declare that the claim was barred by lapse of time—conclusively barred—and Mr. Moody, the administrator, paid it in his own wrong.—*Austin v. Jordan*, 35 Ala. 642; *Pickering v. Lord Stamford*, 2 Ves. jr. 272, 280; *Portlock v. Gardner*, 1 Hare, 594. See, also, *Hallett v. Allen*, 13 Ala. 554; *Marsh v. Hague*, 1 Edw. Ch. 174; *Ellison v. Moffatt*, 1 Johns. Ch. 46; *Wisner v. Barnett*, 4 Wash. Cir. Ct. 631; *Barnet v. Torrence*, 23 Ala. 463. This case, then, resolves itself into the single inquiry, when was the Ready legacy due and demandable?

The will of Mr. Sims is inartificially drawn. Its preparation was commenced February 2d, 1838, and on that day he inserted this clause: "I give unto my beloved wife, Sarah Sims, the tract of land where I now live, with the one on Rum Creek, joining Mother Banks, with all the furniture and stock of all kinds, provisions, and all my negroes, both male and female, with the following restrictions—that is to say: that as my children become of age or marry, they are to have two grown negroes each, say a man and a woman, and as many more as she, my wife, may think proper to give. I mean, when I say stock and furniture of all kinds, horses, cows, hogs, carriages, wagons, carts, plantation tools, and everything as it is now, all during her lifetime or widowhood. But if she should marry or die, then, and in that case, it is my will that all the property I have left her should be sold on one, two and three years credit, with interest after one year, except the negroes; and they are to be sold at private sale, by my executors, to those that they are willing to go to, and no others, regardless of prices, and not to be parted from their husbands and wives and children in no event whatever; and this [I] enjoin on my beloved wife, in case she does not [marry], and in case she marries, she is to have ten thousand dollars paid her by my executors, to do as she pleases with." This will was not completed or signed on that day. Three days afterwards—February 5th, 1838—testator added this clause: "Being still in my proper senses, and on a further consideration of all the matters and things, I have thought proper to alter a part of the first part of my

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will—that is, in case my beloved wife never marries, I wish for her to have five thousand dollars' worth of property left her her lifetime or widowhood, she having the choice of it, to be hers forever, to do as she may think proper with. And, further, by Mr. Aaron Ready, putting in what I have given him heretofore, and his having rendered services which the others could not do, I give him, extra, two thousand dollars. Now, in explanation of this will, as it is done just on my starting to New York, and in a hurry, my will is that the five thousand dollars may be taken out of what I give my beloved wife, and the two thousand dollars extra, which I give Aaron Ready."

The clause of February 5th, copied above, must be treated and construed as a codicil to that part of the will which was written on the 2d. Its expressed object was "to alter a part of the first part of his will." While, under the rules of construction above declared, it must not be construed as revoking or abrogating the first clause, further than is necessary to give it effect according to its terms, yet, being the latest expression of testator's will, it necessarily revokes all previous testamentary disposition with which it is incompatible. In the original bequest to Mrs. Sarah Sims, testator had incorporated restrictions. In the latter expression, he made alterations. In the first, he gave her an estate, during her life or widowhood, in certain described property; and gave her only a life estate. In the last, he gave her an absolute title to five thousand dollars worth of the same property, to be selected by her; but to be hers in absolute right, only in the event she did not again marry. She certainly had the right to select the property during her life; and yet, until her death, it could not be known she would never marry. Selecting the five thousand dollars worth, her right in fee did not attach absolutely until she died testator's widow. In this clause, testator increased the provision made for his widow, by converting into a fee, contingent or defeasible, that which was before a life-time at most. We think it was a defeasible fee—first, because the widow must select the property, which she could do only in her lifetime; and, second, because so long as she remained testator's widow, she had the absolute use of the property, with the power of disposition.

So far as the bequest of two thousand dollars to Aaron Ready is concerned, we think it was demandable at the expiration of eighteen months, for the following reasons: First. There is nothing in the will which shows that the payment was to be postponed until the marriage or death of Mrs. Sims. If such had been the intention of the testator,

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he could easily and doubtless would have so expressed it. Second. If it was intended this legacy should be paid only after the death or marriage of Mrs. Sims, then this was no alteration of the first part of testator's will. In that first part he had only disposed of the life interest, leaving the residuum of the title for after disposition. The construction contended for would be an alteration, not of the first part of the will, but of a later clause, by which disposition was made of the property, after the termination of Mrs. Sims' estate.

The record does not inform us of the quantity of land, number of slaves, or value of the property devised and bequeathed to Mrs. Sims. There are facts suggestive of large value. Two grown negroes, and as many more as the widow might "think proper," were to be given up to each child, as they severally became of age or married. The widow was to have five thousand dollars worth of the property, to be selected by her. In the event she married, she was to have ten thousand dollars in cash, in lieu of the property otherwise given her. Husbands do not usually make increased provision for their wives, contingent on their entering again into matrimonial bonds. Human instincts lead in a different direction. We suppose the provision for Mrs. Sims was liberal; and the inference is not unreasonable that testator supposed and intended that the pecuniary legacy to Ready should be paid out of its increase.

The case of *Colbert v. Daniel*, 32 Ala. 314, has been strongly urged upon us as declaring a rule which will estop applicant from disputing the rightful payment by the administrator of what is known as the Ready legacy. In that case, the executor and the legatees had met together, and had agreed on a construction of the will. The construction was erroneous; but, pursuant to such construction, the executor delivered to the widow certain slaves, as her legacy, which she retained during her life and disposed of by her will. On a proper construction of the will, she was not entitled to the slaves. Subsequent to her death, and to the execution of her will, an attempt was made by one of the legatees to hold the executor responsible for these slaves, as for a devastavit. We held that inasmuch as the complaining legatee was present when the slaves were given off to the widow, under the erroneous construction of the will, and did not then dissent from it, but assented to it, he must stand by the distribution as rightly made. We applied the maxim, *consensus tollit errorem*. To have ruled otherwise would have been to hold the executor responsible for property he had put beyond his control, by the consent of those in adverse

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interest. This, it will be perceived, would have been a great hardship upon the executor; and the case is very like one of estoppel.

In the case before us, the facts are essentially different. The Ready legacy was made a charge on the devise and bequest to Mrs. Sims. As we have intimated above, its payment was probably expected to be made out of the increase and profits to be earned and made by the life estate given to the widow. She alone would have her portion diminished by its payment; for it was to be taken out of what testator gave his beloved wife. Consequently, its payment during her lifetime could not possibly affect the other legatees. It was made no charge on the remainder of the property given to the children, after the termination of the widow's estate, which was, in the main, a life estate. Under the one construction or the other, the executors would distribute, and did distribute the same property in quantity and value, when they came to make the first distribution before the death of Mrs. Sims. Consequently, the executors, in turning over to Mrs. Sims her life estate, did not put beyond their control, or part with any property, or interest in property, to which the other legatees had any claim, or by which they could be affected. Hence, the alleged erroneous construction of the will concerned no one except Ready, the legatee, and Mrs. Sims. We do not think *Colbert v. Daniel* sheds any light on this case. The will says the Ready legacy is a charge on the estate given to Mrs. Sims. We are asked to sanction its payment out of the remainder, which was given to other legatees. We find no warrant in the will, or in the conduct of the parties, for doing so.

Holding as we do above, that the legacy to Mr. Ready was due and demandable at the end of eighteen months after the probate of the will, the administrator *de bonis non* had no authority to make the payment, and thus make it a charge on the remainder.

Reversed and remanded.

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Cubbedge, Hazlehurst & Company v. Napier.

Bill in Equity to foreclose Mortgage.

1. *Foreign law; how must be pleaded and proved.*—Where a party rests his right to relief, or his defense, on the statutes of a sister State, the statute must be substantially pleaded; a general averment of the existence of the statute, and that it confers the right or authorizes the defense is insufficient, being the statement of the conclusions of the pleader, rather than an averment of facts.

2. *Laws of sister State; how proved.*—Under our statute (Code of 1876, § 3045), a certified transcript of the statutes of a sister State, as deposited in the office of the Secretary of this State, or the printed volume purporting on its face to be issued by authority of such sister State, is sufficient to prove the existence of such statutes. The unwritten law, or the judicial decisions of such State, may be proved by the production of the reports of adjudged cases, which are recognized in the particular State.

3. *Interest; what law governs.*—Where interest is expressly or impliedly to be paid upon contracts, the law of the place where such contract is made, or the law of the place of performance, if such contracts are to be performed in a place other than that in which they are made, regulates and controls the rate of interest.

4. *Mortgage; by what law governed.*—Where the mortgagor and mortgagee reside in Georgia, and all the transactions between them take place in that State, and the mortgage does not designate any particular place of payment, the law of that State determines the validity and operation of the contract, and such contract will be enforced so far, and only so far, as it is valid under the laws of that State, no matter where the enforcement is sought, unless it offends the positive law, or violate the public policy of the State in which enforcement is sought.

APPEAL from Macon Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by the appellants, Cubbedge, Hazlehurst & Co., against the appellee, George C. Napier, to foreclose a mortgage given by him to them on certain lands situated in Macon county, Alabama. The answer of the appellee admitted the execution of the mortgage sought to be foreclosed, and claimed a deduction on account of usurious interest and some payments which had not been credited. An amended answer was filed, which averred that at the time of the execution of the mortgage and the note which it was given to secure, "both the parties were residents of the State of Georgia, and that said note and mortgage were made in that State." It is then averred "that the rate of interest in Georgia is fixed by law at seven per cent., and that the effect of the law was to annul and render void all contracts for usury;" "that only the principal sum, and inter-

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est at the rate of seven per cent., was recoverable"; "that at the time of the execution and delivery of said note and mortgage, under and by virtue of said statute laws of Georgia, all titles to property made as part of an usurious contract, or to evade the usury laws of such State, are void." The original answer of the defendant was made a cross bill, and a discovery was prayed as to the state of accounts between the parties. There was evidence tending to show the mortgage was given to secure money loaned at usurious interest. On final hearing, the Chancellor was of opinion that under the laws of Georgia the mortgage sought to be foreclosed was invalid, and dismissed the bill, and complainants bring the case here by appeal.

THOMAS G. JONES, and F. S. FERGUSON, for appellants. The mortgage was on lands situated in Alabama, and the law of that State, and not the law of Georgia, must prevail. The case of *Chapman v. Robertson*, 6 Paige, 627, is directly in point, and is conclusive of the question. Robertson being in England obtained a loan of money from Chapman, and as security therefor executed a mortgage on lands situated in the State of New York. Chapman filed his bill to foreclose in a New York court, and Robertson pleaded that the contract being for seven per cent. interest and made in England, was, by the laws of that country, usurious and void, but the New York court held the mortgage to be a valid security, and that Chapman could not set up the usury laws of England as a defense to the suit.—See, also, 23 Barbour, 63; 38 Barbour, 352. The Georgia statute does not apply to a mortgage—35 Ga. 530—and was not proved.—10 Ala. 805.

NORMAN & WILSON, *contra*.—The note and mortgage were made in Georgia and were to be discharged in that State, and therefore their validity and operation must be tested by its laws. And this is true, although the lands may be situated in Alabama.—*Evans v. Kittrell*, 33 Ala. 449; Story on Conf. of Laws, §§ 287*a*, 293*b*; 10 Wheat. 367; 6 Paige, 627. If, by the statute laws of Georgia, the mortgage was part of a transaction usurious in its nature, it was void under the laws of that State.—See Pamph. Acts of Georgia, 1871–72, page 75. The repeal of the usury laws of Georgia could not make a void mortgage valid.—1 Fla. 371; 14 Mass. 322; 38 Ala. 510; 30 Ala. 120.

BRICKELL, C. J.—Questions of foreign law, are questions of fact, which must in each case be determined by the pleadings and evidence.—*Judge v. Murphy*, 10 Ala. 805; *Syd-*

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ney v. White, 12 Ala. 728; *Gurley v. Cockrell*, 26 Ala. 405; *Walker v. Forbes*, 31 Ala. 9; *Bloodgood v. Grosey*, *ib.* 575; *Drake v. Glover*, 30 Ala. 382.

When the complainant in a bill in equity deduces his title to relief from the statute of a sister State, the statute must be substantially stated in the bill; for the reason, that the court cannot judicially take notice of it. A general averment of the existence of the statute, and that it confers the right, is not sufficient. It is a statement of the conclusion of the pleader, rather than a statement of facts.—*Gunn v. Howell*, 27 Ala. 665; *McDonald v. Mobile Life Ins. Co.* 56 Ala. 468. Thus, in *Cockrell v. Gurley*, *supra*, which was a bill filed by a remainderman for the protection of his interest in certain slaves, which had been allotted in Kentucky to the tenant of the particular estate, as dower in the estate of her deceased husband, the statute of Kentucky, as it was averred, limited her interest to a life estate, with remainder to the next of kin of the husband. The averment was in this form: "That by the statute laws of Kentucky, at the time of the death of said Henry B. Haley," (the husband) "and the allotment of dower to his widow as aforesaid, she was only entitled to a life-interest in the said negro Chaney and her increase, and the estate in remainder vested in the said Mary Ann," (the complainant). This court pronounced the averment insufficient—that it was simply a statement of what the pleader supposed to be the law of Kentucky.

When the complainant relies upon a contract, fair and valid on its face, tested by the law of this State, and it appears to have been made in another State, if the defendant asserts that it is invalid, because it offends the law of the place in which it was made, he must show the invalidity by his pleadings and proof.—*Campion v. Kille*, 1 McCarter, (N. J.) 229. In such case, the answer would not be responsive, and the matter of defense must be averred with certainty, and proved. As a general rule, usury must be specially pleaded at law and in equity. And if the usury consists in the violation of the law of a State, other than that in which the enforcement of the contract is sought, the law is matter of fact, which must be pleaded with the certainty that any extrinsic fact must be pleaded, which is essential to a right of action, or to constitute a defense. The pleader may be well satisfied of his construction of the foreign law, and may assert it as the law itself; that is not his province. The law must be substantially stated; and the facts must be averred which are supposed to constitute its violation. Then, the court can determine whether the facts—the foreign law, which is but a fact—and the transaction supposed to offend

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it, compel a repudiation of the contract.—Tyler on Usury, 459; *Cutler v. Wright*, 22 N. Y. 472.

The original answer, though made a cross-bill for discovery, does not aver the invalidity of the mortgage. It claims only a deduction of usurious interest from the mortgage debt, and payments averred not to have been credited. The amended answer avers the debt was contracted in Georgia, and that the mortgage was there executed. It is further averred, the rate of interest fixed by the law of Georgia was seven per centum per annum, and that *the effect* of the law was to annul and make void contracts for usury, the principal sum and interest being recoverable. The answer then proceeds: "And that at the time of the execution and delivery of said note and mortgage, under and by virtue of said statute laws of Georgia, all titles to property made as a part of an usurious contract or to evade the usury laws of such State are void." Subjecting these averments to the rules we have stated, they are not averments of fact, but of the conclusions of the pleader. It results, therefore, if the law of Georgia is to determine the validity of the mortgage, and if it be violative of the law of that State, the fact is not so pleaded that the court could declare it invalid. The presumption is, that the common law prevails in the several States, having a common origin. Until the contrary is pleaded and proved, it must be presumed to be the law of Georgia, and there is no fact averred or proved, which would render the mortgage offensive to, or violative of the common law.

The Code provides the method of proving the statutes of a sister State, when they become material facts in suits pending in our courts. A certified transcript from the statutes as deposited in the office of the Secretary of this State, or the printed volume, purporting on its face to be published by the authority of the sister State, is received as sufficient evidence.—Code of 1876, § 3045. The unwritten law, or the judicial decisions, may be proved by the production of the reports of adjudged cases, accredited in the particular State.—*Judge v. Murphy*, 10 Ala. 885; *Sydney v. White*, 12 Ala. 728. Either is a fact which must be proved, and of which the courts cannot take judicial notice. The clause of the statute of Georgia, against usurious contracts, which it is supposed renders the mortgage void, it seems the courts of that State do not construe as embracing mortgages. *Sugart v. Maye*, 54 Ga. 554; *Caswell v. Hartridge*, 55 Ga. 412. The theory of a mortgage which there prevails, is, that it does not convey title to the mortgagee—it is a mere security for a debt, the title remaining in the mortgagor, until a fore-

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closure and sale in the mode pointed out by the statutes of the State.—*Davis v. Anderson*, 1 Kelly, 176; *U. S. v. Athens Armory*, 35 Ga. 358. These decisions form no part of the present record, were not proved as facts in the Court of Chancery, and cannot, consequently, be made the foundation of a judgment in this court.

The general rule is, that where interest is expressly or impliedly to be paid upon contracts, the law of the place where they are made, or the law of the place where they are to be performed, if made in one place, and performance in another is stipulated, regulates and controls the rate of interest. *De Wolf v. Johnson*, 10 Wheat. 383; *Andrews v. Pond*, 13 Pet. 65; *Hanrick v. Hall*, 9 Port. 9; *Hunt v. Hall*, 37 Ala. 702. The mortgagor and mortgagees were domiciled in Georgia; all the transactions between them occurred in that State. The note was made and the mortgage was there executed, neither designating any particular place of payment. The indisputable presumption is, that the law of Georgia regulates and controls the rate of interest.—*Moore v. Davidson*, 18 Ala. 209. The principle cannot be controverted, that the nature, validity and construction of contracts are to be determined by the law of the place where made, performance not being promised in another place. If the contract is valid according to that law, or to the extent to which it is valid, it will have the same force and effect everywhere, unless it offends the positive law or violates the public policy of the country in which its enforcement is sought. If, on the final hearing, it shall be ascertained that the mortgage is not made in violation of the statutes of Georgia—that in that State, it would be an operative security for the principal and lawful interest, excluding the usurious or illegal interest, the same operation must be given to it in the courts of this State.

The decree of the Chancellor must be reversed and the cause remanded.

[Logwood v. Robertson, Adm'r.]

Logwood v. Robertson, Adm'r.

Bill in Equity to enforce Vendor's Lien.

1. *Vendor's lien; what will not defeat.*—The fact that the vendor had not obtained the legal title to the land, but held only a bond for title upon payment in full of the purchase money, will not deprive him of a vendor's lien on the land, to the extent of his interest therein, when he in turn sells to another on the same terms; but the sub-purchaser will take, subject to the lien (not merely equitable, but legal) of the first vendor, who had retained the legal title for his security.

2. *Same.*—In such a case, the sub-purchaser has a right to pay the amount his immediate vendor owed the original seller, as an incumbrance on the title, and to have a credit therefor on the amount due his own vendor; and where this is done and a credit allowed, the sub-purchaser has no cause of complaint that his vendor had not made full payment, and cannot set it up to defeat the lien of his immediate vendor.

3. *Same; what conveyance subject to.*—Where the legal title has not passed out of the original vendor, a sub-purchaser, who pays the amount due upon the original purchase—it being less than the amount he owes his immediate vendor, who gives due credit therefor—and receives a conveyance of the legal title direct from the original owner, will take it subject to a lien in favor of his own vendor; and where such payment was made with his own funds, the fact that the sub-purchaser procures title to be made to his wife cannot defeat the lien—the wife standing as a mere volunteer, in no better plight than her husband.

APPEAL, from Limestone Chancery Court.

Heard before Hon. H. C. SPEAKE.

The bill in this case was filed by W. H. Robertson, against the appellants, Hettie B. Logwood and John E. Logwood, her husband, and seeks to subject certain lands in the possession of said Hettie B. to a vendor's lien for an unpaid balance of the purchase-money. Robertson having died pending the suit, his administrator was made party plaintiff in his stead. From the pleadings and proof it appears that on the 22d day of Sept. 1869, Robertson sold to John E. Logwood certain lands, for one-third cash and the balance in one and two years, taking his note for the deferred payments, and giving him his bond for title on the payment of the purchase-money. Robertson had purchased the lands from one Hine, and a part of the purchase-money was still unpaid. Robertson had no deed to the land, but held Hine's bond to make title. There is testimony tending to show that at the time the cash payment on said lands was offered to Robertson, he informed Logwood that there was a balance due the estate of Hine on the purchase of the land, and re-

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quested him to pay such balance out of the cash payment, and at the same time delivered to him Hine's bond, endorsed by himself, for title, with instruction to have a deed made to him (Robertson.) There is testimony, however, for Logwood, tending to show that when it was discovered that Robertson had only Hine's title bond he (Logwood) insisted on a rescision of the sale, and that to prevent this, Robertson and wife transferred Hine's title bond to Hettie B. Logwood, and authorized the conveyance of the land to be made to her, agreeing at the same time that it should go to her, discharged from any lien for the deferred payments of the purchase-money, for which John E. Logwood alone should be responsible. This evidence is flatly contradicted by Robertson. Logwood paid to Hine's administrator the amount due from Robertson, and obtained credit for it as so much cash, and by his procurement an order of the Probate Court was obtained by the administrator to make title, and in pursuance of such order a deed was made to Hettie B. Logwood. It was shown that Logwood had no visible property at the time of his purchase of the lands, and soon after became insolvent and much in debt. Mrs. Logwood, by her answer, which was made a cross-bill, alleged that the cash payment was made with moneys belonging to her statutory separate estate, and sought to have a trust declared in her favor on the lands. Three of Mrs. Logwood's brothers testified that "she had a separate estate;" "that they had borrowed money from her and paid it back." John E. Logwood testified that the money with which he paid the administrator of Hines, belonged to his wife, and that it was obtained by her as follows: "A portion was given her by her father, a portion from the hire of negroes given her, and a portion from speculations made by him with her money." The Chancellor decreed a lien on the lands for the unpaid purchase-money, and ordered a sale to pay the same. From this decree Logwood and wife appeal to this court.

L. P. WALKER, and J. N. MALONE, for appellants.

ROBERT A. McCLELLAN, *contra*.

MANNING, J.—Upon an examination of this record we find that the decree appealed from must be affirmed.

Robertson, appellee's intestate, in the transaction between him and Logwood, gave to the latter a bond to convey when the purchase-money should be all paid. The land was thus, by the express acts of the parties, charged with the payment of the price. And the fact that the title was not then per-

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fect in Robertson, the vendor, did not hinder the contract from so operating. The interest which a purchaser of land acquires, who has paid part of the purchase-money and taken a bond for title upon the payment of the residue, may be sold or mortgaged; but the sub-purchaser or mortgagee will take it subject to the lien, (not merely "equitable" but legal lien) of the first vendor, who, for his security, has retained the legal title in himself.—*Fenno v. Sayre & Converse*, 3 Ala. 458.

Whether it be true, as several witnesses testified, or not, that Robertson told Logwood at the time of their bargaining, that the last installment of the price the former owed to the estate of Hine was due and not yet paid, is a matter of no consequence. Any question that might have arisen out of that fact, was disposed of by what was done subsequently to Logwood's being informed of it. Logwood had the right to pay the residue of the purchase-money due from Robertson to Hine's estate, as an incumbrance on the land, out of the cash installment of the price Logwood was to pay Robertson, and to be credited thereon with the amount so paid—and Logwood did make that payment, and was credited with it by the extinguishment of so much of his debt to Robertson.

But here a contention arises. By the payment to Hine's administrator, which Robertson insists was made by his request and instruction, he, according to the terms of Hine's bond to him, became entitled to a conveyance of the land to himself; and the administrator, upon an order to that effect of the Probate Court, duly obtained, could have made such conveyance. An order was, in fact, obtained by the administrator, and a conveyance of the land made; but the order or decree was rendered in favor of—and the conveyance made to—the wife of Logwood, instead of Robertson. This was done by the procurement of Logwood, to whom Robertson gave Hine's title-bond with his, Robertson's name, indorsed on it, for the purpose, as he says, of handing it to the administrator, that he might take the steps proper for the purpose, and convey the land to him, Robertson. Logwood, on the contrary, says that on learning that Robertson had not a perfect title—he insisted that the contract between them should be rescinded, and that to prevent this, Robertson and wife transferred Hine's title-bond to Mrs. Logwood and authorized the conveyance of the land to be made to her—agreeing at the same time that it should go to her discharged from any lien or liability for the payment of the remaining two-thirds, or \$6,000 of the price, and that he would rely for this upon Logwood alone and the notes he had given

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therefor. This was denied by Robertson. Logwood had no visible property at the time, is not shown to have been then responsible, and was certainly insolvent and much in debt not long afterwards. We have attentively examined the numerous depositions on the subject and cannot perceive that the Chancellor erred in deciding the controversy in favor of appellee.

Moreover, appellants fail in their endeavor to show that the payment made by Logwood for the land, was made with moneys of the separate estate of his wife. The evidence of this is very unsatisfactory and weak, imputing to her moneys belonging to himself—and the profits made by his own exertions and skill, without any deduction for the support of the family. Indeed, we think it appears that whatever interest Mrs. Logwood acquired, was obtained by an instrument that must be regarded as merely voluntary on the part of her husband, that is, as having been procured by him from the administrator of Hine, without any consideration for it proceeding from Mrs. Logwood or her separate estate. The case is, therefore, almost exactly parallel with that of *Pylant v. Reeves*, (53 Ala. 131), in which we said: "As the land would have been indisputably bound for the purchase-money, if the conveyance had been made directly to the husband, and he, on a merely good consideration, had made the conveyance to a trustee for the use of his wife, it is equally bound under the conveyance the vendor made at the request of the husband." "The vendor's lien" (it was added) "prevails with as much force against a married woman purchasing land as against one fully *sui juris*. Her disabilities may protect her, but they can never authorize her to take and hold the lands of another without paying for them."—See *Perkins v. Gibson*, 51 Miss. 699.

Let the decree of the Chancellor be affirmed.

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Bill in Equity for Injunction, &c.

1. *Mortgage; what valid.*—Where the husband, or the wife with his concurrence, purchases personal property, paying part in cash with money of her statutory estate, and they both execute, contemporaneously with, and as part of the sale, a mortgage on the property purchased, to secure notes for the balance of the price, the mortgage is valid, and neither the husband nor the wife can repudiate it.

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2. *Personally belonging to wife; what not pass title to.*—A sale of personalty of the statutory estate of the wife by her and her husband, the instrument not being attested by any witness or acknowledged, will not pass her title in the thing sold.

3. *Mortgage; what does not satisfy.*—Where the assignee of a mortgage and debt secured by it, extends the debt or takes new notes from the mortgagor, this does not extinguish the mortgage, or impair it as a security for the new notes, so far as they represent the original indebtedness secured.

4. *Same.*—Where a conveyance by husband and wife of the statutory separate estate of the wife, in satisfaction of notes secured by a valid mortgage on her property, is not sufficient to pass title, because not witnessed as required by statute, and she repudiates it on that account, the mortgage and debt secured by it, are not extinguished, but remain unimpaired, though in pursuance of abortive sale, the notes and mortgage were surrendered to the mortgagors.

APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

The original bill in this cause was filed by the appellant, Ann E. Kieser, against the appellee, M. A. Baldwin, and her husband, B. H. Kieser, and seeks to enjoin Baldwin from selling or taking possession of certain property under and by virtue of a mortgage executed by her and her husband to Job Trippe, treasurer of the Boston and Fairhaven Iron Works, and by him transferred to Baldwin, or by virtue of a bill of sale to Baldwin of the same property, also executed by her husband and herself. Baldwin filed a cross-bill, in which he alleged, in substance, the following facts: In 1874, Kieser, as trustee for his wife, purchased of the Boston and Fairhaven Iron Works a printing press for a large sum, making a cash payment from funds which formed part of appellant's statutory separate estate, and giving two notes, jointly with his wife, for two hundred and fifty-six dollars and twenty-five cents, each due respectively three and six months after date, for the deferred payments. These notes were secured by a mortgage, on the printing press and other personal property, executed by Kieser and wife contemporaneously with them. These notes and mortgage were transferred to Baldwin, and are his property. Baldwin allowed two extensions of these notes; the first without any change in the security afforded by the mortgage. About this time Baldwin lent B. H. Kieser two hundred and seventy-five dollars, and took his note therefor. After the maturity of both the notes to Trippe, and the loan note of B. H. Kieser to Baldwin were past due, Kieser and wife, in payment of these three notes, sold and conveyed to Baldwin the printing press and certain other personal property, giving him a bill of sale therefor, which was neither witnessed or acknowledged; and thereupon the three notes and mortgage were given up and canceled. The cross-bill avers that the property, other than the printing press, is the property of B. H. Kieser, and was paid

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for with money earned by him. The cross-bill prayed a foreclosure of the mortgage to Trippe and for general relief.

There was a demurrer to the cross-bill, on the ground that the property involved was the statutory separate estate of Mrs. Kieser, and could not be legally mortgaged, and also on the ground of multifariousness. These demurrers the Chancellor overruled, and from that decree this appeal is prosecuted.

G. D. & G. W. HOOPER, for appellants.

SANDFORD & LINDSEY, *contra*.

No briefs came to Reporter's hands.

STONE, J.—If the averments of the appellee's cross-bill be true, the two notes of two hundred and fifty-six 25-100 dollars each, made by Kieser and wife to Trippe, treasurer, were given in part purchase of the printing press, bought from the Boston and Fairhaven Iron Works; and a mortgage, cotemporaneous with the purchase, was made by Kieser and wife conveying the press as security for the payment of said notes. These notes, it is averred, together with the mortgage security, were traded and transferred to Baldwin, and thus became his property. It is further averred that Baldwin allowed two extensions of these notes; the first one, without making any change in the mortgage security. In the mean time, as the cross-bill avers, Baldwin had lent B. H. Kieser two hundred and seventy-five dollars, and had taken his note therefor. The mortgage made to Trippe recites that the printing press was the separate property of Mrs. Kieser, and this view is the most favorable one to her interest. In her original bill she alleges it was purchased with the moneys of her statutory separate estate. Under this view, there can be no question that the mortgage to Trippe, securing as it did part purchase of the press mortgaged, was valid and binding.—*Marks v. Cowles*, 53 Ala. 499; *Coleman v. Sterrett*, 57 Ala. 172.

After the notes thus given by Kieser and wife to Trippe, transferred to Baldwin, had matured, and when the loan note of B. H. Kieser to Baldwin was past due, it is averred that Kieser and wife sold and conveyed the printing press and other furniture of the printing office, to Baldwin, in payment of the three notes; and that thereupon the three notes and mortgage were given up and canceled. The bill of sale or writing, by which this sale and conveyance were made and evidenced, is shown in the record, and has neither subscrib-

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ing witness, nor certificate of acknowledgment. It is contended for Mrs. Kieser that this transaction paid and discharged the old debt for the purchase money; while at the same time the conveyance is inoperative, by reason that it is without subscribing witnesses.—Code of 1876, § 2707; *Williams v. Auerbach*, 57 Ala. 90. We do not think these two propositions compatible. Both can not be true. A void instrument of conveyance can not operate an extinguishment of the valid lien which existed on the press. We think the conveyance attempted by Kieser and wife to Baldwin, of the absolute title of the press and other property, was ineffectual to convey any thing which was the statutory separate estate of Mrs. Kieser, because it wanted subscribing witnesses; and that it did not and could not extinguish the debt, in payment of which it was fruitlessly attempted to be made. When Mrs. Kieser renounced and repudiated the sale thus made, it left unimpaired the debt for which the press had previously been made liable. And the subsequent note and mortgage, to the extent they represented the notes and mortgage given to Trippe, were but a continuation of that liability and lien.—*Boyd v. Beck*, 29 Ala. 712; *McGwire v. Van Pelt*, 55 Ala. 344. It results from this that, to the extent of the two notes given to Trippe, the mortgage of the printing press to Baldwin, according to the averments of the cross-bill, is valid and binding.

As to other property, the cross-bill denies Mrs. Kieser's ownership, and asserts it is the property of Mr. Kieser, earned with his labor. If this be true, then the mortgage signed by Kieser is a valid conveyance of it, and the cross-bill to enforce the lien is well filed.—2 Brick. Dig. 257, §§ 147, 149.

The Chancery Court did not err in overruling the demurrer to the cross-bill.

Affirmed.

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Action on Bill of Exchange.

1. *Indorser; what necessary to bind.*—Where the holder and indorser of a bill of exchange both live in the same city, where the bill is payable, the indorser is entitled to personal notice of dishonor, and will not be bound unless such personal notice was given, or a sufficient excuse shown for not giving it.

2. *Same; what excuses not giving personal notice.*—It is a sufficient excuse

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for not giving an indorser personal notice of the dishonor of a bill of exchange, that the notary, on the day of the dishonor of the paper, called at the indorser's place of business, *during business hours*, to give him notice of the dishonor, and found the office locked and no one there with whom notice could be left; and in that event notice, properly addressed, deposited in the post office, will suffice.

3. *Notice sent by mail; what not necessary to proof of.*—It is not necessary to give notice to produce the notice sent by mail, as a preliminary to making proof of its contents.

APPEAL from Dallas Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

This was an action brought by the appellee, The City National Bank of Selma, against the appellant, S. W. John, to recover the amount of a certain draft, on which John was endorser. The case was tried on a plea of *non assumpsit* and a special plea setting up that defendant was only an accommodation endorser for one M. J. Saffold, and no notice of its dishonor had been given him.

On the trial the plaintiff introduced the bill of exchange, and offered to introduce the protest thereof. The defendant objected to the protest as evidence. The court admitted the protest as evidence of the fact of protest, but not as evidence of notice of dishonor to the defendant, and the defendant excepted. The plaintiff then introduced one Parish, who testified that he was the notary who protested said bill of exchange; that on the day the bill matured, he presented it at the counter of the City National Bank of Selma, before 2 o'clock, P. M., for payment, and was answered by the teller, "no funds"; that in the afternoon of the same day, and during business hours, he went to the office of the defendant in the city of Selma to serve notice of the protest upon him; that he found the office locked and no one there, and that he then deposited the notice of the protest in the post-office at Selma. The plaintiff here asked the witness to state the contents of the notice he carried to the office of defendant. To this question the defendant objected, because it called for secondary evidence, and no predicate for such evidence had been laid. The counsel for plaintiff stated, "that he did not have the notice and demanded it now of the defendant's counsel, who stated that the demand came too late, and that he did not have the notice in court." The court overruled the objection, and the defendant excepted. The witness then stated that the notice was in the usual form and informed the defendant of the dishonor of the bill. This witness further testified that he was a notary, and had been accustomed to protest bills for the plaintiff and to send notices of protest through the post-office, and that this was the custom of the plaintiff. Upon cross-examination this

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witness stated that he knew it was before sundown when he went to the office of defendant, because the stores were open and people were going about the streets, and because he saw the sun shining through the alley. It was shown that both plaintiff and defendant were residents of and did business in the city of Selma, and that the business hours of the plaintiff were from 9 o'clock, A. M., to 2 o'clock, P. M., and that no other notice was given the defendant except the notice deposited in the post-office by the notary, as stated in his testimony. The cashier of the bank also testified that it was the custom of the bank to drop notices of protest in all cases in the post-office, and its business hours were as stated by the notary; that the bulk of the business of Selma was done between the hours of 9, A. M., and 3, P. M.; that during the summer the wholesale grocers closed their houses about 7, P. M., and that some of the tradesmen kept their houses open until 9, P. M.

The defendant, as a witness for himself, testified that at the time the bill was protested he was in Selma; that at this time there were in his office four practicing lawyers and one office boy; that it had always been the custom of his law firm to open their office in the morning and to close it at 6, P. M.; that at no time after the office was open was it locked until 7, P. M., not even when they went to dinner; that about ten days after the maturity of the bill sued on, he went to the office of the plaintiff on business, and while there the cashier stated "that the bank would have to collect the bill of him," and he asked what bill, and was informed that the bill sued on was referred to; that he then stated to the cashier that he had received no notice of the protest, and was informed that the notice had been placed in the post-office; that he enquired at the post-office for the notice, but found none; that on his return from the North, about three weeks afterwards, he found the notice in his desk, where it had been placed by his office boy, who had obtained it from the post-office. This witness was then asked by the plaintiff to state the contents of the notice he found on his desk. To this question the defendant objected. The court overruled his objection, and he excepted. Witness stated that he did not remember the contents further than he at the time understood from it, that the bill sued on had been dishonored. C. W. Hooper, a witness for defendant, testified as to what were business hours in Selma, among the merchants and bankers, substantially as the witnesses for the plaintiff; he further testified that it was the habit of the wholesale grocery houses to close up about sundown; that the merchants usually shipped in

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the morning and received freight in the afternoon; that the banks sent around notices of matured paper in the morning, and that in the afternoon, after business hours, merchants frequently attended to their payments, for this purpose going into the bank at the side door, and paying bills to the bank as late as 6 or 7, P. M. E. W. Pettus, a witness for the defendant, testified that he was a lawyer by profession, and that the lawyers generally remained in their offices all day and sometimes at night; that in the summer the heat of the sun was so great, that many of them did not remain in their offices.

The court, at the written request of the plaintiff, gave the following charges: "1. The law requires that when the holder of the bill, and the endorser sought to be charged, reside in the same place, the holder will be required to give personal notice of the protest, unless he is excused from so doing, and if a man has an office or place of business that is the place where he is usually to be notified of protest, and if the jury believe from the evidence that the notary public went to the office of the defendant before sundown, and if they believe that at that hour of the day, when the notary went to the defendant's office, was during the usual hours of business in Selma, and if the notary found the office locked and no one there with whom to leave the notice, then the holder did what the law required him to do in order to give notice. 2. The question of what are business hours in Selma is a question for the jury to determine from the evidence adduced before them by the witnesses, and they are not to have reference alone to the office hours of the defendant in this cause, or to the office hours of any particular trade or profession, but must consider and give due weight as to what are the general hours of business in Selma. 3. The certificate of the notary, taken in connection with the evidence of Parish, is to be taken as evidence that the protest of the bill was regularly made, according to law, on the day of the date, and that the bill was formally protested in accordance with that certificate." The defendants separately excepted to the giving of each of these charges, and requested the following written charge: "1. If the jury find, from the evidence, that at the time the note sued on matured, the defendant had a well known residence and a well known place of business in Selma, and that the defendant was in Selma on the day of the maturity of the note and the day afterwards, all of both days following his usual custom of business; and if they further find from the evidence that no notice was given to defendant of the dishonor of said bill sued on, either the day of the dishonor of the bill or the next day: then if the jury

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further find that the notary went to the office of defendant about sundown on the day the bill was protested, for the purpose of giving notice of dishonor of the bill, and found the doors closed, and that this was the only effort made to give notice, then the jury, under the evidence, if they believe it, must find for the defendant." This charge the court refused to give, and the defendant excepted.

The various rulings, to which exceptions are reserved, are now assigned as error.

W. C. WARD, for appellant.—Notice to produce a paper comes too late during the progress of a trial, and secondary evidence of the contents ought not to be admitted.—*Bates v. Ridgeway*, 48 Ala. 611, and authorities cited. The first charge given, at the request of the plaintiff, was erroneous. The notary had all the next day to give notice and he made no effort to do so, and the charges assert that what he had done, which at best was but an unsuccessful attempt to give notice, was all the law required to be done. The second charge was too general; that which determines what business hours are, is when the bulk of the trade is done; besides, if the business hours of the defendant were known to the notary or the holder, it would be preposterous to attempt to charge him with notice by going to his office when his day was done.—Danl. on Neg. Insts. vol. 1, p. 448, § 603. The charge asked by the defendant should have been given. What is sufficient or reasonable diligence, when the facts are ascertained, is for the court to determine.—Dan. on Neg. Insts. vol. 2, § 1058.

W. R. NELSON, *contra*.—There was no error in allowing proof of the contents of the notice of dishonor, even if there had been a demand made for the production of the paper itself.—*Eagle Bank v. Chapin*, 3 Peck. 182; Sharswood's Byles on Bills, marg. p. 302; Wharton Ev. vol. 1, § 81, note 3. The notice sent to the business office of John was sufficient, if sent in business hours, even though no person be found in attendance.—Byles on Bills, 280. Where the person had a dwelling house and a business office in the same town, a notice sent to either place is sufficient.—Byles on Bills, 424; 3 McLean, 96; *Stephenson v. Primrose*, 8 Porter, 155. In this last case the court held, that if a party absent himself during business hours, without leaving some one to attend to his interest, the holder will be excused from giving notice. See, also, 1 Pick. Rep. 413. It was for the jury to say what were business hours, and the charges given left this question fairly to them. What are business hours, are not to be

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determined by the custom of any particular trade, but with respect as to what are the general business hours of the place.—Dan. Neg. Insts. § 601. In two cases, presentment at an attorney's office at 8, P. M., was held sufficient.—*Triggs v. Newnham*, 1 Car. & P. 631; *Morgan v. Dawson*, 1 Stark, 114.

STONE, J.—When this case came before this court at a former term, the record failed to show that the notary's visit to defendant's office was within business hours.—See *John v. City National Bank of Selma*, 57 Ala. 96. In that case the Circuit Court had instructed the jury, as matter of law, that the proof of notice was sufficient. The proof made in that case was, that before sunset on the day on which protest was made, the notary in person carried a written notice of protest to defendant's law office; that he found no one there, and that the law office was closed and locked. Thereupon, without further search for Mr. John, he deposited the notice in the postoffice addressed to Mr. John. This court, after stating that the burthen of proof rested on the holder to show notice, or an excuse for not giving it, added: "If the absence of the indorser from his place of business when it was visited for the purpose of giving him notice, is relied on as an excuse, it must be shown the absence was *during hours of business*. It is only during such hours it is reasonable to expect to find him there, or any one with whom notice could be left for him. The evidence is very indefinite as to the hour of the day at which the notary visited the office of the indorser. No note of the time seems to have been made; it was in the afternoon of the day of dishonor, and *before sundown*, according to the recollection of the notary. What were *business hours* in Selma is not shown; and for aught that appears, the visit may have been at an hour when the notary could not justly and reasonably expect to find the indorser there. The visit may have been made to that office with the bare hope of finding the indorser, and relieving himself from further trouble in giving notice. The residence of the indorser was known, and he was not sought there. Notice on the succeeding day would have been sufficient, yet it was not given; but, not finding him at his place of business in the afternoon, and it may have been at an unreasonable hour, notice deposited in the post office—the mode of notice the least troublesome to the notary—is the resort. When the facts are ascertained, the sufficiency of notice, or of the excuse for not giving it, is a question of law. The Circuit Court erred in holding there was due notice of the dishonor given by the deposit of notice in the post office; or, that the absence of the indorser from his place of business,

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as it is shown by the evidence, was an excuse for the failure to give notice." The substance of what was decided in that case is, that the holder and indorser being residents of the same place—the city in which the protest was made—personal notice of the dishonor was required; and under the evidence disclosed in that record, no sufficient excuse was shown why such personal notice was not given. In holding that notice deposited in the post office was insufficient in that case, this court simply followed many former rulings. *Stevenson v. Primrose*, 8 Por. 155; *Gindrat v. Mechanic's Bank*, 7 Ala. 324; *Greene v. Farley*, 20 Ala. 322. See, also, *Tyson v. Oliver*, 43 Ala. 455; *Phillipe v. Harberlee*, 45 Ala. 597. So, in the second branch of the proposition, this court only followed *Stevenson v. Primrose*, *supra*. In that case this court said, "to make the excuse available, it should have been shown, not only that the witness called at the plaintiff's place of business, but it should appear further that the visit was made at a seasonable time—viz: *within the hours of business*." True, in the former opinion in this case, mention is made of the fact that the notary did not call at the residence of Mr. John, and that he did not renew the effort on the next day to find him. The opinion, however, does not declare on what ground the diligence is adjudged insufficient. The failure to show that the call was made within business hours, was, as we have seen, fatal to the legal sufficiency of the excuse.

The proof in the present record, is different from that in the former one. Witnesses testified, *pro* and *con*, on the question, what were business hours in Selma; and the question, whether the witness' visit was within business hours, was fairly submitted to the jury in the charge of the court. The verdict proves this issue was found in favor of the plaintiff. It is, then, an established fact in this record that the notary, on the very day on which the bill was dishonored, and within business hours, called at the office of the indorser to give him notice of the dishonor, and found the office closed and locked, and no one there with whom notice could be left. The exceptions to the charges raise the question, was this sufficient, or should the notary have visited the indorser's residence, or repeated the call the next day? In the case of *Crosse v. Smith*, 1 Maule & Sel. 445, notice was sent by a clerk, who, between 10 and 11 o'clock, A. M., knocked at the counting-house door of the persons sought to be charged, and found nobody there. Lord Ellenborough, pronouncing on the sufficiency of this excuse, said: "That brings it to the question, whether sending the bill by a clerk, after 10 o'clock, and knocking and waiting at the counting-house

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door, was sufficient notice in point of law; and we think that it was." He cited and approved Lord Eldon's similar ruling in the case of *Goldsmith v. Bland*, where "the only notice of the dishonor of a bill was by a clerk of the indorsee, who went to the counting-house of the indorser, found the counting-house shut up and no person there; saw a servant girl, who said nobody was in the way, and he then returned without leaving any message." In the case of *Allen v. Edmonson*, 2 Car. & Kir. 547, Baron Rolfe ruled that if "a party send a messenger once, in due time and during the hours of business, to the place of business of another party who is entitled to have notice of the dishonor of a bill, for the purpose of giving such notice, and there be no one there to receive it, that is equivalent to verbal notice." Of similar import is the case of *Lord v. Appleton*, 15 Me. 270. In Chit. on Bills, marg. 453, it is said: "Sending a verbal notice to a merchant's counting-house is sufficient, and if no person be there in the ordinary hours of business, it is not necessary to leave or send a written one, nor is it necessary to make inquiries after the party so as to give him notice elsewhere." And, on page 471, the same author says: "If the drawer has a counting-house where he transacts business, and at which the bill was addressed, it suffices to apply there for the purpose of giving notice, without attempting to give or leave notice at the residence of the drawer." To the same effect is Bayley on Bills, 273; Byles on Bills, marg. 280; Story on Bills, § 300; Thompson on Bills, 509; Daniel on Neg. Insts. § 1016; 1 Parsons on Notes and Bills, 487. The last two elementary authors, after stating the principle as above, express some doubt of the safety of the practice, but they cite no authorities in support of their doubts. Edwards, in his work on bills and notes, is not definite on this question.—See page 456.

On a question of commercial law, such as this, it is highly important that the courts of different States and governments, having commercial intercourse, should be harmonious in their rulings. We find the authorities as we have stated them above, and we do not feel at liberty to depart from them. The Circuit Court did not err in the charges given, nor in the charge refused.

It was not necessary to give notice to produce the notice sent by mail, as a preliminary to making proof of its contents.—Sharswood's Byles on Bills, marg. 303, and authorities on the brief of counsel.

Protest of bill for non-payment is a solemn official act of a sworn officer, charged with the duty. True, the protest is not the dishonor; it is the evidence of it. Notice of the

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dishonor, consists in "notice of the facts showing, or fairly implying that the drawee has refused to accept or pay the bill when presented for that purpose at the right time and place, or other acts done which are deemed equivalent." Edwards on Bills and Notes, 470; Code of 1876, § 1336.

The judgment of the Circuit Court is affirmed.

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Garnishment.

1. *Objection to deposition; when comes too late.*—Motion to suppress part of a deposition comes too late after the trial has been entered upon, if based on the ground that the answers are not responsive to the questions; because, if such objections are sustained, the deposition may be retaken and the facts proved lawfully. Such objection should be made before the trial is commenced.

2. *Same; what objection may properly be made on trial.*—Objections on the ground of illegality or irrelevancy may properly be made pending the trial of the cause.

3. *Evidence; what inadmissible.*—A witness who testifies to the receipt of a telegram from the plaintiff, requesting him to notify the defendant that certain cotton was not the property of the shipper, but belonged to plaintiff, and that the telegram was sent by a messenger to the business house of defendants, cannot be permitted to testify what the messenger said when he returned as to the delivery of the telegram to the defendant, and what they said in reply; this is but hearsay.

3. *Purchaser from agent; when does not acquire title against principal.*—Where the plaintiff authorized a person to ship cotton belonging to him, to the defendants in New York, and the testimony shows that he gave such person authority to ship in the plaintiff's name, and did not give authority to ship in any other person's name, such agent, by shipping the cotton in his own name, taking a bill of lading accordingly, cannot, by negotiating such bill of lading, charge the cotton with the payment of advances made on the faith of such bill of lading.

4. *Title; who cannot give.*—Although possession is one of the most general indicia of ownership, mere possession of a chattel, without title, will not enable a man to transfer a better title than he had himself; and one purchasing from a party in possession, who had no authority to sell, can acquire no right to the property as against the owner.

5. *Bill of lading; negotiability of.*—A bill of lading issued by a railroad company for the receipt of cotton for shipment, does not stand in the category of commercial paper. A merchant who advances money to a person not the owner, on the strength of the bill of lading, does not thereby acquire a lien on the cotton, or right of property therein.

6. *Ratification; what does not amount to.*—Although ratification of unauthorized acts, given after knowledge brought home to the person for whom the act purports to have been done, will validate the act to the same extent as if it had been previously authorized, mere acquiescence cannot be considered as ratification, and furnishes no ground for the doctrine of estoppel, unless such silence and acquiescence, after knowledge, forms the basis, or becomes the authority on which another, to the knowledge of the true owner, parts with value or incurs liability.

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7. *Charge; what erroneous.*—It is error in the court in its general charge, to refer to authorities cited by counsel “as being so like this case in its facts,” &c. Such a charge is a charge on the effect of the evidence, and has a tendency to mislead the jury.

8. *Charge; what properly refused.*—A charge which requires the owner of cotton which had been shipped by an agent, in violation of instructions, in his own name, to notify the consignee on the day of shipment, that the cotton was his, and wrongly shipped in the name of the agent, asserts too strict a rule of diligence, and is properly refused.

9. *Plea; what bad on demurrer.*—A plea by defendants, which fails to aver authority in the shipper to ship, but avers “that the cotton was consigned to them through their agent as the property of one W. J. Carter,” and “that they made an advance of one thousand dollars, and honored a draft of four hundred dollars, on the faith of the bill of lading, and of said cotton, whereby they had a lien on said cotton which they had acquired *bona fide*,” is bad on demurrer, when filed to a complaint alleging the ownership of the cotton to be in the plaintiff.

10. *Charge; what should be given.*—Although a plea may be bad on demurrer, if the plaintiff takes issue on it, a charge directing the jury to find for the defendant if the evidence sustains the plea, should be given.

11. *Charge; what improper.*—A charge to the jury, that if “they believe from the evidence that plaintiff acquiesced in the act of the shipper, by which the cotton was shipped to defendants in his (the shipper’s) name, then the law is that the plaintiff is estopped from complaining of the consequences of the assumption of ownership on the part of the shipper,” is erroneous, and properly refused.

APPEAL from Madison Circuit Court.

Tried before Hon. LEWIS WYETH.

The appellee, Robinson, commenced this action by attachment against the appellants, Moore & Co., to recover of them the sum of \$1,500, proceeds of seventeen bales of cotton, the property of plaintiff, which defendants sold as the property of one Carter, applying the proceeds to the satisfaction of a debt Carter owed them.

The defendants pleaded—1. “Not guilty.” 2. “That the cotton, for the price of which said plaintiff sues, was consigned to them through their agents as the property of one William J. Carter; that their said agent advanced on the bill of lading, covering said cotton, at the time of shipment to said Carter, the sum of one thousand and five dollars; that they (defendants) honored and paid a draft drawn by said Carter on the faith of said cotton, for four hundred and seven dollars and twenty cents, and there was and is a general balance due said defendants as the factors of said William J. Carter, a sum greatly in excess of the amounts realized from the sales of said seventeen bales of cotton, and defendants aver that they have a lien on said cotton and the proceeds thereof, to satisfy said amounts advanced and paid by them as aforesaid, and for said balance due as aforesaid, which they acquired *bona fide*, and this they are ready to verify.” 3. “General issue, with leave to give any special matter in evidence, which, if well pleaded, would constitute

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a good defense." Issue was taken on all of these pleas. The other facts, material to a proper understanding of the case, will be found in the opinion.

The court gave a general charge to the jury, which, among other things, contained the following clause: "But, gentlemen, the Supreme Court has relieved me of a great deal I intended to say. The case read by counsel for plaintiff, in 46 Ala., is so much like this in its facts, and in the law it decides, that it would seem to be unnecessary to say any thing further on the subject." The appellants objected and excepted to this portion of the general charge. The appellants then requested the following written charges, which were separately refused, and a separate exception reserved to the refusal to give each of said charges: 3. "That it was Robinson's (plaintiff) duty on the 3d day of May, 1871, to notify Robert Moore & Co. by telegraph that the cotton was his property, and shipped in Carter's name in violation of his instructions." 4. "That the notice by Robinson to defendants will not deprive defendants of their right to retain from the proceeds of the cotton an advance they had made to Carter on said cotton, on the faith of its shipment to them before such notice." 5. "If the jury believe from the evidence that plaintiff acquiesced in the act of William J. Carter, by which he (Carter) shipped the cotton in controversy to Robert Moore & Co., in his (Carter's) own name, then the law is, that plaintiff is estopped from complaining of the consequences of this assumption of ownership on the part of said Carter in said seventeen bales of cotton." When this charge was asked by the defendants, the court declined to give it, and in doing so stated that he considered it abstract, and that he had heard no evidence showing the acquiescence of the plaintiff in the shipment of the cotton in the name of Carter, to which statement of the court the defendant excepted. Thereupon the court said it withdrew the remark, and added, "If the jury find that there was evidence tending to show that plaintiff acquiesced in what Carter did, they would consider it." The various rulings of the court, to which exceptions were reserved, are now assigned as error.

JOHN D. BRANDON, and DAVID P. LEWIS, for appellants. The answer of the witness, Chambers, was pure hearsay, and was not admissible. The messenger alone, who gave the notice, could testify to it as a fact. The same reasoning shows that the testimony of Chambers as to the response was also hearsay. Robinson gave Carter such an agency and dominion and control over the cotton as justified appellants in dealing with him as owner.—8 Pick. 101. Robinson allowed

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Carter to obtain possession of the bill of lading, and he obtained a valuable advance from Moore & Co. on it as collateral security. This gave them a better right than any one else had.—12 Pick. 297. This bill of lading was a negotiable instrument.—1 Peters, 445; 12 Pick. 307; 5 Met. 306; 18 Johns. 157; Redfield on Railways, 143; 30 Ala. 608. Robinson allowed Carter to hold himself out as agent, and where a person holds himself out as principal, with the consent of the owner, third persons who deal with him *bona fide*, are entitled to all the rights which they would have, if he were the real principal.—17 Pick. 159; 7 Beav. 506; Story on Agency, §§ 390, 443, 444, 419, 420.

In all cases of delegated authority, if the agent acts without authority, and the principal subsequently ratifies the act, he is bound by it, whether it be for his detriment or advantage; and whether it be founded upon a tort, or upon a contract.—Story on Agency, §§ 242, 244, 249, 253 and 256. Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.—Herman on Estoppel, § 484; 49 Ala. 186. Robinson should have used all due diligence to notify Moore & Co. of the wrongful act of Carter, and his failure to do so as soon as he reasonably could, estops him from asserting that Carter exceeded his authority.

L. P. WALKER, *contra*.—The testimony of Chambers was legal evidence; he only states the manner in which he gave the notice. It does not appear how the response was made, and it may have been in writing. The mere fact that Robinson authorized Carter to ship the cotton, did not estop him from setting up that the cotton was his. Mere possession by Carter did not give person a right to treat him as the owner to the detriment of Robinson. There must be something more than a mere delivery to an agent to estop a principal from claiming his property in the hands of one securing possession through the agent.—See 46 Ala. 483; 3 Otto, 575; *Leigh Bros. v. M. & O. R. R. Co.*, 58 Ala. 191. These cases are decisive of every question presented by the record, except the exceptions to the admissions of Chamber's testimony. They show conclusively that Robinson had done nothing which would estop him from asserting or prevent a successful assertion of his ownership of the cotton.

STONE, J.—The appellants were cotton commission merchants, having two places of business, one in New York, and one in Cincinnati. They did business in each city in the same firm name, Robert Moore & Co., composed of the same

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partners. The appellee, Robinson, owned seventeen bales of cotton, which were at the Scottsboro depot, on the Memphis and Charleston railroad, for shipment. Carter was a cotton buyer, operating at Scottsboro, and had been engaged in buying cotton, and shipping it to the Cincinnati house for sale. He was indebted to them for a balance on the transactions of the preceding year. Robinson determined to ship his cotton to New York for sale, of which determination Carter had notice. At his (Carter's) request, Robinson consented to allow him (Carter) to ship the cotton, consigned to Robert Moore & Co., New York, Carter giving as a reason for the request that it would benefit him. On the 3d day of May, 1871, Carter shipped the cotton, in his own name, consigned to Robert Moore & Co., New York. On the same day Carter took the train for Nashville, Tennessee, and the record fails to show him in Alabama again until the 17th of May, 1871. On the 4th day of May, Carter, producing the railroad's receipt, or bill of lading, obtained from Humphrey at Huntsville, agent of Robert Moore & Co., of Cincinnati, one thousand dollars as an advance on the cotton shipped, and delivered the bill of lading to him (Humphrey). On the 15th May, Robert Moore & Co., of Cincinnati, cashed Carter's draft on them, drawn after the shipment of the cotton, for the sum of four hundred and seven dollars. These two payments exceed the value of the cotton. Robinson testified that the consent he gave Carter to ship the cotton, was to ship it for him (Robinson), and that he gave no consent to have it shipped in the name of Carter. He further testified that on the 13th May, 1871, he procured a telegram to be sent to a mercantile firm in New York, requesting such firm to notify Robert Moore & Co., that the seventeen bales of cotton so shipped by Carter in his own name, belonged to him (Robinson). On the 17th May, Robinson, Carter and Humphrey had an interview, at which he again claimed the cotton, and inquired of Carter by what authority he had obtained an advance on his (Robinson's) cotton. Robinson testified that Carter's reply to this was, that he did not obtain the advance on the cotton, but on general account. Other witnesses testified that the advance was obtained on the strength of the cotton shipped.

A question is raised, and was controverted in the Circuit Court, as to the diligence Robinson employed in disavowing Carter's ownership of the cotton, and in disclaiming his authority to ship it in his name. For the purpose of proving that Robert Moore & Co., of New York, received notice of the telegram sent to the mercantile house, May 13th, 1871, an employe of said mercantile house of New York was exam-

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ined by deposition, and the defendants in the Circuit Court moved to suppress certain answers of the witness, first, because the answers were not responsive to the interrogatories, and, second, because they are shown to be only hearsay. The first of these objections cannot be taken after the trial is entered upon, because, if sustained, the deposition may be retaken, and the facts proved, lawfully.—*McCreary v. Turk*, 29 Ala. 244. To be available, this objection must be taken before the trial is begun. The second objection may be made on the trial, because, if the testimony is in itself illegal, it cannot be so taken as to legalize it. The witness testified that when the telegram of May 13th was received, it was sent by the hands of the messenger of the house to which it was addressed, to Robert Moore & Co.; and the witness was allowed to testify to what the messenger said when he returned from Robert Moore & Co., to the effect that he had delivered the telegram to them, and what they said in reply. All this was hearsay, and should have been suppressed on the motion of defendants. This ruling applies to the answers to the 6th, 8th and 10th direct interrogatories, and to all other answers substantially the same. This ruling necessarily works a reversal of the judgment of the Circuit Court. There is presented, however, the main question of merit in the cause, which will come again before the court on a second trial. We feel it our duty to consider this.

It is among the undisputed facts in this case, that the seventeen bales of cotton, for the proceeds of which this suit was brought, was the property of appellee, Robinson, and was not the property of Carter; and that Robinson authorized Carter to ship the cotton to Robert Moore & Co., New York. The disputed questions are, did this mere authority to ship authorize Carter to ship it in his own name? Did Robinson give him authority to ship in his own name? And if he did not, did he ratify the unauthorized act of Carter, when informed that he (Carter) had shipped in his own name? Robinson testified that Carter requested of him the privilege of shipping the cotton, stating it would benefit him (Carter); that he gave him authority to ship it for him (Robinson), but gave him no authority to ship it in his (Carter's) name. This is all the testimony on this question. We feel justified in affirming that there is no testimony in the record of any express authority given by Robinson that the cotton be shipped in Carter's name; and we do not understand appellants as contending there is any such evidence. This narrows the contest to the inquiry, did the authority to Carter to ship for Robinson, authorize him to ship in his own name, and justify third persons in dealing with the cotton as Carter's? Or, do

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the facts and circumstances prove that Robinson, on being informed that Carter had shipped in his own name, ratified the act?

Mr. Benjamin, in his excellent book on sales of personal property, says: "In general, no man can sell goods, and convey a valid title to them, unless he be the owner, or lawfully represent the owner. *Nemo dat, quod non habet.*"—Benj. on Sales, § 6. He mentions several exceptions to this rule, some of which do not apply to this country; as, market overt, sections 7, 8, 9; sales governed by the factor's act, 6 Geo. 4, ch. 94, s. 2, amended 5 and 6 Vict. c. 39, sec. 19. In 1 Chit. on Con. 11 Amer. Ed. page 534, is the following language: "It is said, however, that if the real owner of goods suffer another to have possession thereof, or of those documents which are the *indicia* of property therein, thereby enabling him to hold himself forth to the world as having, not the possession only, but the property, a sale by such person to a purchaser without notice, will bind the true owner. But probably this proposition ought to be limited to cases where the person who had the possession of the goods, was one who, from the nature of his business, might be taken, *prima facie*, to have had the right to sell." Benjamin, commenting on this language, says, sections 19, 20: "This limitation, suggested by Mr. Chitty to the rule propounded in the *dicta* of the two learned judges, was approved by the barons of the exchequer in *Higgins v. Burton*, and when thus limited, the principle does not differ substantially from the provisions of the factor's act, as amended by the 5 & 6 Vict. c. 39. But the cases recently decided under the factor's act leave this statement open to grave doubt, and show the extreme difficulty of defining the subject matter to which it applies."

In *Covill v. Hill*, 4 Denio, 323, it was said: "It is a principle of the common law, which has but few exceptions, that a man cannot be divested of his property without his consent. And although possession is one of the most usual evidences of title to personal chattels, yet, as a general rule, mere possession will not enable a man to transfer a better title than he has himself, or than he has been authorized by the owner to grant. Exceptions in favor of trade are allowed in the case of money and negotiable instruments. But as to other personal chattels, the mere possession, by whatever means it may have been acquired, if there be no other evidence of property, or authority to sell from the true owner, will not enable the seller to give a good title." In that case, plaintiff had placed a large lot of lumber on the banks of the canal, pursuant to an executory agreement with one Potter, to sell him the lumber; but Potter had not complied, and the

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title remained in the plaintiff. A second agreement was then made, to the effect that Potter was, "on that day, to pay plaintiff two dollars per thousand on the lumber, and *the plaintiff should hold the title and possession of the lumber until he should be paid the full amount of the purchase-money, with interest from the first day of April preceding.* It was further agreed that Potter, *as the agent and in the name of the plaintiff,* should ship the lumber to the defendants at Albany, Potter paying freight, to be sold by the defendants *as the property of the plaintiff,* and the avails thereof, to the amount of the residue of the purchase-money and interest, to be accounted for and paid by the defendants to the plaintiff. On the next day, Potter, through his son, shipped the lumber to the defendants, but, in violation of the agreement, failed to notify the consignees that the lumber was shipped on account of plaintiff, while he drew on the consignees for a sum equal to four dollars per thousand feet of lumber shipped. This draft was in the name of Potter, and every thing communicated to defendants was calculated to convince them the shipment was on Potter's account. The consignees did not know Covill, the plaintiff, in the transaction. They paid the draft in ignorance of Covill's rights, and the question was, whether Covill or the consignees should lose the money, Potter having failed to pay Covill for the lumber. From 1828 to 1842 Potter had been engaged in the lumber business, which amounted to forty or fifty thousand dollars a year. The lumber in question was shipped from his yard in Elmira. He both manufactured and purchased lumber; and uniformly shipped lumber to be sold on his own account. He was, during that period, in the habit of shipping lumber to the defendants, who were lumber dealers in Albany, to be sold on his account. The lumber so consigned to defendants amounted to from five to fifty thousand dollars per year. The course of business was for Potter to forward lumber to the defendants, and make drafts upon them on account of it. At the time of the receipt of the lumber in question, he owed the defendants more than five thousand dollars, above all property of his in their hands. The defendants claimed that they were innocent purchasers without notice, and defended on that ground. The defense was held invalid, the court remarking: "The transaction amounted to nothing more than a bailment of the lumber to Potter for the purpose of forwarding it to the defendants to be sold, with an interest in the bailee as to all which the property might bring beyond the specified sum of \$8.25 per thousand feet. Potter had no more power over the property as against the plaintiff, than though he had received it as a common carrier for hire, and

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without any other interest; nor did the plaintiff do any thing which was more likely to mislead third persons than though he had delivered the property to Potter as such common carrier. And it hardly need be said, that a mere bailee can neither give a good title nor create a valid lien as against the true owner."

In the case we have in hand, according to the testimony of the only witness who testifies about this part of the transaction, the authority given to Carter was to ship the cotton to New York for Robinson. In this view, Carter only became Robinson's agent to ship, and to ship for him. And if Robinson gave him no authority to ship in his own name, he should, as other agents, have executed the power and authority in the name of his principal, not in his own name. Violating his duty, on this hypothesis, and doing in his own name that which he should have done in the name of Robinson, could not, without the concurrence or ratification of Robinson, enlarge his power to charge, encumber, or sell the cotton. Being but an agent to ship, a purchaser from him could acquire no greater title or interest than he had himself. Cotton is only a common chattel, and does not stand in the category of commercial paper. According to this hypothesis, the defense resting on the face of the railroad's bill of lading or manifest, is weaker than that relied on, and ruled insufficient, in the case of *Covill v. Hill*, 4 Denio, *supra*. To the same effect are *Andrew v. Dieterich*, 14 Wend. 31; *Salters v. Everett*, 20 Wend. 267; *McMahon v. Sloan*, 12 Penn. St. 229. *Pickering v. Bush*, 15 East, 38 is not opposed to this view. These cases all rest on the doctrine that while possession is *prima facie* evidence of ownership of every species of personal property, yet, whoever deals with such possession upon the mere evidence which possession affords, takes upon himself the risk that there is another and true owner, and the burden of proving, should there be such better owner, that he had, by his own act, authorized the sale, ratified it, or furnished evidence of the seller's authority to dispose of the goods, other than his mere possession, although that possession, as possession, was permissive. So, in the case of the *Idaho*, 3 Otto, 575, the court say: "It is hardly necessary to say that the title of the true owner of personal property cannot be impaired by the unauthorized acts of one not the owner. Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading, or even selling the property and obtaining a full price for it, can have no effect upon the right of the owner. Even a *bona fide* purchaser obtains no right by a purchase from one who is not the owner, or not

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authorized to sell.”—*Bott v. McCoy*, 20 Ala. 578; Sto. on Agency, § 225. As a general rule, the title of property, like the flow of a stream, cannot rise higher than its source; and so, one not the owner, and not having authority therefor, conferred by the owner, cannot sell, or make a valid pledge of property.—1 Smith Leading Cases, Part 2, pages 1192 *et seq.*, Seventh Am. Ed. A different rule prevails if the seller have a title, even though acquired by fraud. A *bona fide* purchaser for value from such fraudulent holder of the title, without notice of the fraud, will be protected.—*Lickbarrow v. Mason*, and notes, 1 Smith Leading Cases, 2d Part, pages 1147, 1190 *et seq.*; *Leigh Bros. v. Mobile & Ohio Railroad*, 58 Ala. 165; *Voss v. Robertson*, 46 Ala. 483.

Ratification of unauthorized acts, given after knowledge is brought home to the person for whom the act purports to have been done, validates the act to the same extent as if it had been previously authorized.—*Bott v. McCoy*, *supra*; Sto. on Agency, § 239, and notes; 1 Brick. Dig. 59. But, ratification and acquiescence are not synonyms.—See the dictionaries. The latter is but testimony to be considered in determining the *factum vel non* of the former. Nor is there anything of estoppel in the mere act of silence or acquiescence. It is only when such silence or acquiescence becomes the basis, or authority on which another parts with something valuable, or incurs a liability, that the doctrine applies. The doctrine is that in such case, the party is estopped to assert the truth, because its assertion would work a fraud on him whose conduct had been influenced by such silence or acquiescence.—*Miller v. Hampton*, 27 Ala. 342, and authorities cited.

In the general charge is the following language, which was excepted to: “The case read by counsel for plaintiff in 46th Alabama [*Voss v. Robinson*] is so much like this in its facts,” &c. This being in the general charge, we must presume it was given by the court without the request of either party. In this the Circuit Court erred. By assuming, as the charge did, what were the facts in this case, it was a charge on the effect of the evidence.—Code of 1876, section 3028; *Beasley v. The State*, 50 Ala. 149. It is subject to criticism on another ground. Its inevitable effect was, to lay before the jury that other case, which they would probably compare with the one on trial, and in this way the jury would be liable to be misled by such extraneous issues. The third charge asked require of Robinson too rigid a rule of diligence in giving notice. The matter of diligence in giving notice in this case, is only material as shedding some light on the

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question of ratification of the act of shipment in Carter's name. There is no principle of estoppel in it.

Plea No. 2 contains no averment that Robinson authorized Carter to ship the cotton, either in his own name or otherwise. It leaves undenied and unanswered the averment in the complaint that the seventeen bales of cotton were the property of plaintiff. Its averment is that the cotton was "consigned to them through their agent as the property of one William J. Carter," and that they made the advance of one thousand dollars, and honored the draft of four hundred and seven dollars, on the faith of the bill of lading, and of said cotton; and then avers they have a lien on said cotton, which they acquired *bona fide*. It does not aver that when they made the advance, and honored the draft, they were ignorant that the cotton was Robinson's. There was no demurrer to this plea. Under the issue formed, and on this plea, the fourth charge asked should have been given.—*Mudge v. Treat*, 57 Ala. 1. The fifth charge asked was rightly refused. Acquiescence is not necessarily ratification, though evidence tending to prove it. Whether he acquiesced, and whether he ratified the shipment of the cotton in Carter's name, was a question for the jury under all the evidence. To acquiesce is to forbear opposition or complaint. To ratify is to make valid, to confirm. We frequently acquiesce, without approving.

For the errors pointed out, the judgment of the Circuit Court is reversed and the cause remanded.

BRICKELL, C. J., not sitting, having been of counsel.

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Bill in Equity to foreclose Mortgage and enforce Vendor's Lien.

1. *Mortgage; who not entitled to protection against, as bona fide purchaser.* Though the vendee holds the vendor's deed, reciting full payment of the purchase money of lands, one dealing with the vendee with reference to such lands, with knowledge that the purchase money is not fully paid, is put on inquiry as to the amount due the vendee, which would lead to the ascertainment of the extent of the lien, if not waived; or if waived, of the security the vendor had taken in lieu of it; and if such purchaser being thus put on inquiry fails to make proper inquiry, relying on the vendee's statements, he cannot claim protection against a mortgage on the lands, executed by the vendee to the vendor, to secure payment of the purchase money, on the ground of want of actual notice of its existence.

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APPEAL from Butler Chancery Court.

Heard before Hon. ADAM C. FELDER.

The appellee, Harriet P. Stallworth, filed this bill against the appellants, Foster, Neville & Co., and the heirs of one W. W. Greene, and sought to foreclose a mortgage on certain lands, executed by said Greene and wife, and also to enforce a vendors lien on said lands for a balance of unpaid purchase money.

The facts may be thus stated: In the fall of 1866, Thomas N. Stallworth, the husband of complainant, made an agreement with W. W. Greene to sell him the tract of land in controversy. On the 21st day of December, 1866, Greene paid to Stallworth two thousand dollars, and gave the joint note of himself and wife for the balance of the purchase money, including therein also a small sum for personal property sold, payable to the complainant, Mrs. Harriet P. Stallworth, on the first day of January, 1868.

Stallworth and wife made an absolute deed to Mrs. Greene, acknowledging full payment of the purchase money, with the usual covenants of warranty; and thereupon Greene and wife executed a mortgage on the lands conveyed, and some personal property, to complainant, bearing the same date as the deed, to secure the payment of the note. This mortgage was not recorded until the 14th of August, 1867. The deed of Stallworth and wife to Mrs. Greene was recorded in the proper office, on the 22d day of December, 1866.

On the 18th day of January, 1867, the said Greene and wife, then being in the possession of the lands, and claiming them under the deed of Stallworth and wife, executed a mortgage on said lands to appellants, to secure the payment of about four thousand dollars. This mortgage was recorded on the 18th day of January, 1867.

It is clearly shown by the proof, that appellants advanced to said Greene two thousand dollars on the 20th of December, 1866, for the purpose, as Greene informed them at the time, of paying Stallworth for the land, stating to them, that it was in full payment of the balance due on said lands. This advance was made, on the promise to give a mortgage on the lands to secure this and other advances, which they agreed to make to enable said Greene to run the plantation during the year 1867, and the note for four thousand dollars was made to cover the advances, all of which were made before the 14th day of August, 1867. A balance of about six hundred dollars, due to the appellants for the year 1866, was likewise included in the four thousand dollar note, secured by the mortgage by Greene and wife to appellants. It is alleged in the bill, that at the time appellants took their mort-

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gage from Greene, they had notice that the purchase money had not been paid to Stallworth.

On final hearing, the Chancellor decreed that the complainant was entitled to a foreclosure of her mortgage, and ordered an account to be taken to ascertain the balance due, &c. From that decree Foster, Neville & Co. appeal.

WATTS & WATTS, for appellant.

JUDGE & BOLLING, *contra*.

BRICKELL, C. J.—The single question to which the argument of counsel has been directed, is whether the appellants, Foster, Neville & Co., had at the time of the execution of the mortgage by Greene to them, notice of the prior mortgage to the appellees. It is not denied that they had notice that Greene derived his title from the appellees. It is also an undisputed fact that they knew he had not fully paid the purchase money; for so much of the debt secured by the mortgage to them, as was contracted contemporaneous with the execution of the mortgage, was for money loaned him to remove the lien or encumbrance of the purchase money. This fact was sufficient to put them upon inquiry, and inquiry would have led them to knowledge of the existence of the mortgage to the appellees. The general rule laid down in the books is, that whatever is sufficient to put a party upon inquiry is good notice; that is, where he has sufficient information to lead him to a fact he shall be deemed conversant of it.—2 Lead. Eq. Cases, 100; *McDougald v. Scroggins*, 8 Ala. 382. Knowledge that the purchase money of the lands was partly unpaid—that the recital of its payment in the conveyance was not to be relied on as evidence of the fact, ought to have excited the vigilance and inquiry of those dealing with the vendee. They would know the law gave the vendor a lien for so much of the purchase money as was unpaid, unless some other security for its payment had been accepted. Inquiry would lead to knowledge of the extent of the lien if it had not been waived, or to knowledge of any security the vendor had taken in place of the lien. If Foster, Neville & Co., instead of inquiring, chose to rely on the statements of the mortgagor, as to the amount of the purchase money unpaid, and on his good faith in applying the money loaned to its extinguishment, they must take the consequences of their misplaced confidence. The equity and the legal right of the appellees is older than that which they assert. Priority can be accorded to them on no other ground than a want of notice of the older equity and right. If they had not actual

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notice, they had constructive notice—knowledge of the facts which compelled them to inquire; and inquiry would have led to actual notice. Without considering the evidence tending to prove actual notice, which is in some respects conflicting, we rest our decision on the undisputed fact that they knew the purchase money was partly unpaid, which was enough to put them on inquiry, and operate as notice.

Affirmed.

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Bill of Equity to declare Mortgage a General Assignment.

1. *Fraudulent conveyance; what creditor need not do, to assail.*—A creditor having a pledge for the payment of a debt, is not bound, if he assails as fraudulent a subsequent conveyance by the debtor to other creditors, or asserts that it is a general assignment, in the benefits of which he, and all the other creditors, are entitled to participate, to offer to relinquish the pledge, or to bring it in as a contribution to a common fund, for the equal benefit of the fraudulent donee and himself, or that other just creditors shall have share in it.

2. *Demurrer; what will be considered.*—This court can consider only such specific grounds of demurrer as were interposed in the court below; other grounds are waived.

3. *Judgment; what questions conclusive of.*—Where complainant, being a corporation, without fraud or collusion, recovers a judgment against a debtor in its contract the judgment determines the validity of the contract, and the question cannot be reopened, when the creditor gives into equity to reach and condemn equitable assets.

4. *Foot note; when not necessary.*—Where there is a proper foot note to the original bill, and an amendment is allowed, by striking out certain paragraphs, and inserting certain allegations in lieu of one of the paragraphs the defendants were required to answer, no additional foot note is necessary.

5. *Amendment; what may introduce.*—An amendment may introduce new matter, where it consists of facts occurring after the filing of the original bill, pertaining and not foreign to the matter of the original bill; and where the amendment abandons any claim, as to one of the matters as to which relief is sought, this cures any objection on the ground of multifariousness, because the claim thus abandoned was joined with others, as to which it had no necessary or proper connection.

APPEAL from Pike Chancery Court.

Heard before Hon. H. AUSTILL.

The original bill in this cause was filed by the appellant, the Alabama Warehouse Company, and John W. Durr, A. R. Baker and others, its stockholders, against the appellees, U. L. Jones and John R. Lawson. The bill averred that, in the year 1872, the defendant Jones borrowed of the appellant one thousand dollars, and as part of the consideration of said loan, he deposited

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bonds" of one hundred dollars each; that Jones afterwards, during the year 1872, received from said company divers sums of money, and made several payments on the same, in the shipment of cotton, and that, at the end of the season, it was found that said Jones was indebted to appellant over one thousand dollars. On this balance the stockholders brought a joint suit, and recovered a judgment against Jones for eleven hundred and eighty seven dollars and ninety-five cents. Nothing had been paid on this judgment. The bill then averred possession of the bonds deposited by Jones, and that they had greatly depreciated, and were not now worth more than five hundred dollars.

The bill also avers, "that on the 11th day of October, 1873, the said Urban L. Jones executed and delivered to John R. Lawson, a mortgage, ostensibly to secure a debt of five thousand dollars, which said mortgage debt was made payable one year after date," and by it conveyed to Lawson certain property of said Jones, situated in Troy, comprising the whole of block "C" in that town, except that said Jones reserved a house and lot in said block, known as the Jones hotel. The bill further avers the property embraced in the mortgage was of value doubly sufficient to pay the mortgage debt, and embraced all the property of said Jones which could be reached by execution; and that at the time of the making of the mortgage no money passed between the said Lawson and Jones, but that the only consideration for said mortgage was an antecedent debt, due said Lawson, of small amount, and was made mainly for the purpose of hindering, delaying and defrauding the creditors of said Jones. The bill prayed a decree declaring the mortgage fraudulent and void, or that it be declared a general assignment and enuring to the equal benefit of all the creditors of said Jones, and that the complainants be allowed to participate in the same; "that the court should decree that the fifteen Troy bonds be sold and the proceeds applied to the judgment of complainants;" or that an account be taken to ascertain the value of said bonds, and that such amount be credited on the judgment, and for the balance that a lien be declared on the property covered by the mortgage, and for general relief.

Lawson and Jones demurred to the bill, on the grounds: 1st. Misjoinder of parties—in this, the Alabama Warehouse Company, a private corporation, sues, and with it the individual stockholders are made parties complainant. 2d. That the bill is multifarious, in this—it seeks to declare a mortgage a general assignment or a fraud, and at the same time it seeks to procure a sale of Troy bonds held as collateral, and in no wise connected with the fraud or general assignment.

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ment, and "with which defendant Lawson is not connected with the said bonds held as collateral, and as against him no relief can be granted as to them." 3d. There is no offer to do equity, by allowing the funds arising from the sale of said Troy bonds to be distributed among the creditors of said Jones, if said mortgage be declared a general assignment. Before the hearing, the complainants amended their bill by striking out the names of the stockholders as complainants, and adding and averring that the judgment was the property of the Alabama Warehouse Company, and by striking from the prayer of the bill all prayer for relief as to the Troy bonds. The amendment was inserted in lieu of the paragraph stricken out, which was one of the paragraphs which the foot note required defendants to answer.

The prayer of the bill as amended, is that the mortgage be declared void as to the creditors of said Jones, as to debts existing at the time said mortgage was executed, and that complainants have a superior lien upon said property, mentioned in their original bill, to the lien of said mortgage, and for general relief. No foot note is attached to this amendment. In this amendment it is further averred, that since suit brought the complainants had purchased said Troy bonds for the sum of five hundred dollars, which was to be credited on the judgment they had obtained against Jones.

Lawson demurred to the amendment, on the grounds: "1st. Complainant does not offer to do equity by the bill, in this—he has taken the entire amount of the collateral he held and not offered to divide with the other creditors. 2d. Complainant has changed the character of his bill, in this—that it was first filed to enforce a lien sale of bonds, and during its pendency complainants purchased the bonds, and now by amendment under the same bill, and without change of parties, it seeks to declare void a mortgage, and have the mortgage property sold to pay the overplus. 3d. There is no foot note to the amendment, prescribing the matters or portions to be answered, as required by rule 10 of chancery practice."

On final hearing the Chancellor sustained the demurrer, both as to the original and amended bills, and dismissed them without prejudice; and from that decree this appeal is prosecuted.

N. W. GRIFFIN, and CLOPTON, HERBERT & CHAMBERS, for appellant.

PARKS & HUBBARD, *contra*.

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BRICKELL, C. J.—1. The amendment removed two of the causes of demurrer to the original bill—the joining the stockholders as complainants with the corporation; and the relief prayed in reference to the pledge of the bonds of the city of Troy. The remaining ground of demurrer was not well taken. A creditor having a pledge for the payment of a debt, is not bound if he assails as fraudulent a subsequent conveyance by the debtor to other creditors, or asserts that it is a general assignment, in the benefits of which, he and all other creditors are entitled to participate, to offer to relinquish the pledge; or to bring it in as a contribution to a common fund for the equal benefit of the fraudulent donee and himself, or that other just creditors shall share in it. The pledge is his own security, carved out by his own contract for his own protection, and the only equity other creditors can assert, is its application to the reduction of his debt, lessening his claim on the funds to which they can resort in common with him.

2. A bill may be originally framed with a double aspect, or may be so amended as to be of that character. The rule is inflexible, however, and a departure from it would produce vexatious uncertainty, and inextricable confusion, that the alternative case stated *must be the foundation for precisely the same relief*.—Story's Eq. Pl. §§ 251–4. It may be the original bill assailing the mortgage to Lawson as fraudulent, and claiming that it should be vacated, and yet, in another aspect, asserting that it is a general assignment, enuring under the statute, to the equal benefit of all creditors, and praying that it be so declared, is repugnant and inconsistent in its allegations, and in its prayers for relief, offending the rule to which we have referred. This was not, however, assigned as cause of demurrer, and if it had been, an opportunity to amend would have been afforded the complainant. The statute confined the Chancellor and confines the court, to the causes of demurrer specifically assigned; all others, the demurrant is supposed to waive.

3. There is not an averment in the bill which negatives the power of the complainant to loan money; and if the demurrer was intended to raise that question, it finds no warrant in the averments of the bill, and it is the sufficiency of these alone it involves. That question, however, it is too late to raise—the judgment at law obtained by the complainant, without collusion with the debtor, is conclusive of the validity of the contract on which it is founded.—*Mayor v. Lord*, 9 Wall. 409.

4. Another ground of demurrer is, the want of a foot note to the amended bill, specifying the particular statements

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each defendant was required to answer. In *Winter v. Quarles*, 43 Ala. 692, it was held, the omission is good cause of demurrer. Whether the defect is not rather a ground for a motion to strike the bill from the files, than cause of demurrer, it is scarcely necessary to consider. When the objection is presented in the one way or the other, the defect is so easily remedied, that the mode of presenting it cannot be a matter of practical importance. Under our practice amendments may be made by simply striking out facts of a bill or answer, by interlineation or erasure, when of a brief character. The essential is, that the amendment must be made in such manner, that it may be ascertained in what it consists.—Rule 42, Chan. Pr. The amendment in the present case was by striking out, as well as by introducing new matter; and as to the matter stricken out, no answer from the defendants could be required. The new matter was embraced in a single paragraph, and a foot note requiring an answer to it was unnecessary. Such note is necessary, when the bill is divided into sections, and numbered, (as an original or amended bill must be when it consists of more than one section,) and a defendant has a right to know which of these he is required to answer.

5. It is not the office of an amendment to a bill, to introduce a new and different case from that made by the original bill—thereby, defects in the original bill would not be cured, or new matter put in issue to meet the allegations of an answer; but the amendment would be in fact a new bill. The amended bill is not obnoxious to this objection—the new matter introduced by it, was of facts occurring after the original bill had been filed, pertaining, and not foreign to the matter of the original bill. The rules of practice authorize the introduction of such matter, by an amendment. All relief in reference to the pledge of the city bonds was thereby shown to be unnecessary, and that the controversy in reference to them had been adjusted. If the original bill was multifarious because it sought to enforce the pledge of these bonds, the amendment abandoning that claim cured the defect.

The decree of the Chancellor, sustaining the demurrer must be reversed, and the cause remanded.

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Savannah & Memphis Rail Road Co. et al. v. Lancaster et al.

Bill in Equity to foreclose Mortgage or Deed of Trust.

1. *Complainants' title and right to relief ; how must be stated.*—Matters essential to complainants' title and right to relief, must be shown by clear and unambiguous averments in the stating part of the bill ; and though, on demurrer, the court might not feel bound to refuse, it cannot be required to seek explanation of a defective allegation in the stating part of the bill, by reference to a clear averment of the same matter in a subsequent part ; yet in the absence of allegation in the stating or any other part of the bill, of material facts or transactions on which the title depends, the description or designation of plaintiffs "as trustees," or as "certain holders of bonds and coupons," and the like, is insufficient.

2. *Bill for foreclosure ; what not demurrable.*—A bill to foreclose a deed of trust to secure bonds issued and put in circulation by a corporation and made payable to bearer, is not demurrable, because it fails to allege to whom such bonds were negotiated in the first instance, or how much was paid for them, or when they were issued.

3. *Same.*—Where a deed of trust or mortgage, made by a railroad company to secure an issue of bonds and interest thereon, provides that in default of payment of interest for six months, the principal should also become due, a bill by the trustees for foreclosure, averring such default in payment of interest, is not demurrable, because it fails to allege that the interest coupons were presented for payment at the office or agency at which they were payable.

4. *Bond ; what does not destroy negotiability of.*—A provision in a bond for payment of money, payable to bearer, issued and put in circulation by a corporation, that the bond might "be registered and made payable by transfer only on the books of the company," does not of itself make such bonds non-negotiable by mere manual transfer.

5. *Deed of corporation ; what sufficiently executed.*—Where a conveyance or deed purports on its face to be the deed of the corporation, and recites that it has caused its corporate seal to be thereto affixed, and its president to sign the same, and the deed is properly witnessed or acknowledged, this is a sufficient execution ; and the validity of the deed is not impaired by the fact that the president signed the deed in his own name with the word "president" added, or that the secretary likewise signed his own name to it in the same way.

6. *Resolution authorizing issue of bonds and mortgage ; what sufficient compliance with.*—A resolution of the board of directors of a corporation, authorized an issue of its bonds, prescribing only the amount and denomination of the bonds, what date and rate of interest they should bear, and that they should be payable in American gold coin, free from government taxes, in New York, and also authorized the execution of a deed of trust on all the road, franchises and property of the company, for the security of the bonds, without prescribing any other terms which the deed should contain. All the specified conditions were observed. The bonds were made payable twenty years after date ; and in the deed of trust it was further provided that a foreclosure might be made to pay the whole debt, whenever default in payment of interest had continued for six months : *Held*—As to the terms of the trust deed, other than those prescribed in the resolution, it must be presumed that it was intended to be in such form and with such stipulations as are usual in such instruments ; and

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default of payment of principal or interest, the mortgage was not executed contrary to directions, or without authority.

7. *Railroad corporation; power of to borrow money to build its road, and secure same by mortgage.*—A railroad corporation, unless restrained by statute, has the implied power to borrow money to construct its road, and to secure the debt thus created by mortgage on its property.

APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

Bill for foreclosure of trust deed by the appellees, who describe themselves as follows: Your orators, Robert A. Lancaster and John F. Tanner, *as trustees for divers parties holding* and owning certain bonds and past due coupons thereof, of the Savannah and Memphis Railroad Company, under and by virtue of a deed of trust executed and delivered to them by said railroad company for the trusts and purposes therein mentioned; and Abby Harrington, Mason Young, John J. Thomas, Hiram Sibley, Hiram W. Sibley, William A. Hadden, and William W. Carson, certain holders of said coupon bonds and of past due coupons thereof, and *cestui que trusts* of the trustees, all of whom are over the age of twenty-one years, and who join in this bill of complaint for the equal benefit of themselves and of all the holders of the first mortgage bonds of said company, secured by said deed of trust." The bill then alleges that the Savannah and Memphis Railroad Company "prepared and executed the first mortgage bonds of said company under its corporate seal and the signatures of its President, Sam'l G. Jones, and its Secretary, Sam'l E. Holt, for one thousand dollars each, payable to the bearer, on the 1st day of May, 1890, in American gold coin, and bearing interest at the rate of eight per cent. per annum. It is further alleged that these bonds, to the amount of four million one hundred and sixty thousand dollars, had been issued and negotiated by the company.

A copy of the bond is made an exhibit. They each recite that "the Savannah & Memphis Railroad Company is indebted to the bearer of this bond in the sum of one thousand dollars, in American gold coin, which the said company promises to pay on the 1st day of May, in the year eighteen hundred and ninety, at the office or agency of the company, in the city of New York, with interest thereon from the 1st day of May, 1870, at the rate of eight per cent. per annum, free from United States government tax, payable semi-annually in gold coin as aforesaid, at the said office or agency on the first day of November, and the first day of May of each year, upon the presentation and surrender of the annexed coupons as they severally become due. . . . These bonds may be registered and made payable by transfer only on the books of the company." The corporate seal of

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the company is attached to each of these bonds, and they are also signed by the president and secretary respectively; but the exhibit does not contain any copy of the coupons, or refer to them, otherwise than by the recital in the body of the bond.

It is then averred "that the said Savannah and Memphis Railroad Company, for the purposes of securing the payment of the principal and interest of said bonds to the holders thereof, did also, on the 18th day of August, 1870, prepare, execute and deliver to the said Robert A. Lancaster and John F. Tanner, under its corporate seal, and the signatures of Sam'l G. Jones, its President, and Sam'l E. Holt, its Treasurer, a mortgage deed, constituting them trustees for certain trusts therein specified, conveying to them in trust the property of the railroad company of every kind and description." This mortgage is made an exhibit to the bill, and recites that it is executed under the following resolution, adopted by the board of directors on the 8th day of August, 1870: "Resolved, That the President is hereby authorized to issue the first mortgage bonds of the company for four million one hundred and sixty thousand dollars, covering the road, franchise and property of the company from Girard to Tusculum, Alabama; said bonds to be issued in sums of one thousand dollars each, in American gold coin, payable in New York; interest at eight per cent., payable semi-annually, in gold, free of government tax, and to secure the payment of said bonds and the interest thereon, the president is authorized to execute a deed of trust on the road, franchises and property as above, said bonds bearing date May 1st, 1870." The mortgage then recites that bonds to the amount authorized by this resolution have been prepared and are ready for negotiation; provides that the trustees shall endorse each bond, to identify it as one entitled to the benefits of the mortgage; declares that it is executed for the purpose of enabling the railroad company to negotiate the bonds for the purpose of raising money with which to complete and equip its railroad; and conveys all the property and future acquisitions of every description to the trustees therein named, "for the equal benefit and security of all of the persons and bodies corporate who have or may become holders of the said bonds, or of any of them, without reference to the time when they respectively may have been or may be issued and negotiated." This mortgage provides that in case default shall be made in the payment of the principal or interest of said bonds for the space of six months, "then it shall be lawful for the said trustees, or the survivor of them, or their or his successor, either personally or by attorney, to sell and dispose of the

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railroad and other property therein conveyed, and to make and deliver to the purchaser of the property so sold, good and sufficient titles, applying the money realized, first to the payment of the interest then due on said bonds, and then to the payment of the principal, whether due or not at the time of said sale." This mortgage, or trust deed, commences as follows: "This indenture, made the 18th day of August, A. D. 1870, between the Savannah & Memphis Railroad Company, a railroad corporation duly created by and under the laws of Alabama, party of the first part, and Robert A. Lancaster and John F. Tanner, of the city and State of New York, trustees upon certain trusts hereinafter specified, of the second part," &c. It concludes as follows: "*In witness whereof*, the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by its president, Samuel G. Jones, and its secretary, Samuel E. Holt, in the presence of James M. Muldon and William D. Dunn, who subscribed their names thereto as witnesses on the day and year first above written.

SAMUEL G. JONES, President. [L. s.]

SAMUEL E. HOLT, Secretary. [L. s.]

R. A. LANCASTER. [L. s.]

JOHN F. TANNER. [L. s.]

Sealed and delivered in the presence of James M. Muldon, William D. Dunn."

The bill further avers the acceptance of the trust by the appellees, the issue and negotiation of the whole amount of the bonds authorized by the resolution, and a default in the payment of the interest on the same for more than six months.

The bill then avers the issue and sale by the company of a large amount of second mortgage bonds, bearing interest at the rate of seven per cent., dated on the 1st day of January, 1873, and secured by a deed of trust covering the same property, with Henry G. Marquand and Richard Irwin, Jr., as trustees. The railroad company and the second mortgage trustees are made parties defendant, and a foreclosure of the first mortgage is prayed. On petition, certain holders of stock of the railroad company, and of certain second mortgage bonds were allowed to become parties defendant. They filed a demurrer to the bill on the grounds—1. That the mortgage sought to be foreclosed "does not appear to be signed at its foot by the contracting party (The Savannah and Memphis Railroad Company), or its agent having written authority, nor is the seal of said company attached thereto." 2. "That the bill fails to show or state that the railroad company ever delivered any of the bonds alleged to be secured by the mortgage, to any person, partnership or corporation

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capable of holding or receiving such bond, or the name of such person, partnership or corporation, to whom such bonds were delivered, or the time or place of such delivery." 3. "That the bill fails to show that the complainants, other than the trustees, own or have title to any bond or coupons secured by the mortgage sought to be foreclosed, or that they ever purchased any such bonds directly from the railroad company, or that any such bond was registered and transferred to them, or either of them, on the books of the company." 4. "That the bill fails to show that the president of the railroad company ever issued any bond entitled to the security of the mortgage sought to be foreclosed, although it is shown by said mortgage that that officer alone had power to issue bonds and mortgage to secure them under the resolution copied in said mortgage, which is the only authority for the issue of the bonds, for the payment of which this suit is brought." 5. "That the bill fails to aver that any of the holders of said bonds ever presented or offered to surrender any of the coupons attached, at the office or agency of said company, in the city of New York, or at any other place, or to show any good reason why such presentation and offer to surrender was not made." 6. "That the bill fails to show that the railroad company ever received any money, or anything of value, as a consideration of said bonds, and fails to show any power or authority in said company to issue bonds without any consideration." 7. "That the bonds in suit bear on the face interest at the rate of eight per cent., and the bill fails to show any authority of said railroad company to issue bonds at a rate of interest greater than seven per cent." 8. "That the bill shows on its face that Sam'l G. Jones, President, and Sam'l E. Holt, Secretary, had no power or authority to execute the mortgage sought to be foreclosed, the only power conferred being on the president, and that only on the property then owned by the company, and that neither said Jones or Holt had any power to make the principal of said bonds fall due before the time expressed on their face, to-wit, on the 1st day of May, 1890, or to fall due on default of payment of the interest."

The Chancellor overruled each and all of these demurrers, and the defendants bring the case here by appeal.

G. D. & G. W. HOOPER, for appellants.—The bill must show complainants' claim or title to relief with accuracy and clearness, and the matters necessary to relief must appear, not by inference, but by direct and unambiguous averment. 35 Ala. 70; 26 Ala. 405. The averments of a bill must be taken most strictly.

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Ala. 138; 35 Ala. 309; 30 Ala. 352. The bill failed to show any title to the bonds in Harrington and the other complainants, other than the trustees; the averment that they are *holders* is not an averment of title in them. The contract of the company provided that these bonds should be transferred only on the books of the company, and the bill utterly fails to show or allege any such transfer. The bill should have alleged the time and place of the execution and delivery of the bonds, for the bonds bear date May 1st, 1870, and the mortgage is executed to secure them, "without reference to the time when they respectively might have been, or might be issued or negotiated," thus showing that the bonds might have been issued after that date. The date of the execution of the contract was material, and the failure of the bill to show it is fatal.—*Reel v. Overall*, 39 Ala. 138. The bill does not show that the holders presented any of the coupons for payment, and by express condition of the bonds the interest is payable only on the presentation and surrender of the coupons. The mortgage sued on was not properly executed. The Code required that "conveyances for the alienation of lands must be signed at their foot by the contracting party or his agent, having written authority." In this case, the contracting party is the railroad company, and its name is not signed to the deed as required by the statute.—*Hendon v. White*, 52 Ala. 597. But this mortgage is not effective as to either personal or real estate.—26 Ala. 591; 28 Ala. 507; 21 Ala. 72; 24 Wend. 442. The bill fails to show any consideration for the bonds, and the company had no authority to issue bonds without any consideration. Such an act was *ultra vires*. A corporation has only such powers as are delegated to it, in express terms, or arise by necessary implication.—See 1 Stew. 279; 5 Port. 279; 30 Ala. 461; 32 Ala. 76; 36 Ala. 319; 41 Ala. 510. A promissory note given for the performance of such a contract is void, and will not be enforced by the courts.—39 Ala. 319. By the act of January 14, 1856, railroad companies were authorized to borrow money at as high a rate as seven per cent., and were expressly restrained from borrowing at a higher rate, and a contract to pay a higher rate was *ultra vires* and void. The case of the *Bank of the U. S. v. Owens*, 2 Peters, 527, is conclusive on this point. See, also, 3 Vesey, Jr., 539; 8 Ohio, 257; 11 Ohio, 498; 12 Ohio, 544. There is no room for the doctrine of estoppel. *Bank v. Dunkin*, 54 Ala. 479; 9 Peters, 467.

W. H. BARNES & SON, *contra*.—The only necessary parties were the trustees, the *cestui que trust* being only *proper* parties, and need not have been joined in the bill at all.—68

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Penn. St. 37; 5 Gray, 162; 16 Gray, 407; 4 Stew. & Por. 447; Jones on Railroad Securities, § 361; 1 Wood, 368; 20 Wall. 117; 11 Wall. 459. It is not necessary to aver presentment of the past due coupons at the place designated. If the suit is prematurely brought, it is matter for a plea in abatement.—Jones on Railroad Securities, § 334; 2 Woods, 574; 54 Penn. St. 127; 6 Ala. 701; 2 Ala. 342; 2 Stew. 234. The description of the complainants is sufficient to show their right to become parties to this bill. The bonds are made payable to bearer, and the parties being set forth as holders is equivalent to an averment of possession. Possession is *prima facie* evidence of title.—27 Ala. 208; 36 Ala. 708; 17 Ala. 566; 40 Ala. 271. The question of usury cannot be raised by demurrer, but must be made the subject of a plea. The railroad company had authority to borrow money for purposes germane to its business. And moreover, if this were a proper presentation of the issue of *ultra vires*, it could not avail in this case; the contract being executed on the part of the holders of the bonds as purchasers.—Green's Brice's *Ultra Vires*, (1 Am. Ed.) 372, 619; Field on Corp. 286 to 310, and notes; 6 Otto, 258; 47 Ind. 407; 63 N. Y. 62; Potter on Corp. 2 Vol. § 508; 17 Barb. 378; 4 John. Ch. 370; 16 Cal. 255; 5 Fla. 110.

MANNING, J.—Plaintiffs are described in the introductory part of their bill as follows: "Your orators, Robert A. Lancaster and John F. Tanner, *as trustees for divers parties holding and owning certain bonds and past due coupons thereof, of the Savannah and Memphis Railroad Company, under and by virtue of a deed of trust executed and delivered to them by said railroad company for the trusts and purposes therein mentioned; and Abby Harrington, Mason Young,*" and others named, "*certain holders of said coupon bonds and past due coupons thereof, and cestui que trusts of the trustees aforesaid . . . who join in said bill of complaint for the equal benefit of themselves, and of all the holders of the first mortgage bonds,*" aver, allege, &c. And appellants (who were defendants below), assuming that there is nothing more in the bill showing title in the plaintiffs to the subject in controversy, insist by demurrer, that this is not a sufficient statement of title or interest in plaintiffs to enable them to maintain the suit.

Description is not, in pleading, equivalent to averment. And it was not necessary, in setting forth in the beginning of the bill who the plaintiffs were, to explain in the same breath their connection with or relation to the matters in respect of which the suit was brought.—1 Dan. Ch. Pl. & Pr. (4th Amer.

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Ed.) 359. That is the office of the stating part, or premises, of the bill, (Sto. Eq. Pl. § 27,) which should "contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition."—Code of 1876, § 3761. Says Judge Story: "Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the *premises*. . . . A general charge or statement, however, of the matter of fact is sufficient; and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge."—Sto. Eq. § 28. "The rules of pleading require," says the Supreme Judicial Court of Massachusetts, "that every material averment that is necessary to entitle the plaintiff to the relief prayed for, must be contained in the stating part of the bill, and this is a useful rule for the preservation of form and order in the pleadings. This part of the bill must contain the plaintiff's case and his title to relief, and every necessary fact must be distinctly and expressly averred, and not in a loose and indeterminate manner to be explained by inference, or by reference to other parts of the bill. The defendants are not bound to answer any averment not contained in the stating part of the bill." This was delivered in answer to the argument "that the defect may be supplied, or the meaning of the stating part of the bill be explained by the averments in the charging part of the bill.—*Wright v. Dame*, 22 Pick. 59. This strictness is, perhaps, extreme. We should not feel bound to refuse, though we ought not to be required to seek, explanation of a defective allegation in the stating part by reference to a clear averment of the same matter in a subsequent part of the bill.—*Houghton v. Reynolds*, 2 Hare, 264. But when no allegation at all is made in the stating or any other part of the bill, of material facts or transactions on which the title of those bringing suit depends, it would be too great a relaxation of the wholesome and too little heeded rules of the pleading, to take as a substitute the mere description or designation of plaintiffs "as trustees," or as "certain holders of bonds and coupons," or by other additions which imply that such facts or transactions had occurred. "It is a general rule that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision."—Sto. Eq. Pl. § 255. And this court has emphatically said: "The matters essential to complainant's right to relief, must appear not by inference, but by clear and unambiguous averment." *Duckworth v. Duckworth*, Ex'r. 35 Ala. 70. Indeed, the more direct and clear the allegations of such a pleading are, the freer it is, generally, from prolixity and repetition.

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Upon examination of the bill before us, we find that it distinctly alleges in the stating part the execution by the railroad company of the deed mentioned as the first mortgage, to Lancaster and Tanner, by which they were (it is alleged) constituted trustees of the property described in it. Their trusteeship, therefore, is sufficiently averred.

And they, the trustees, were the only necessary parties plaintiff to the suit. Though any of the bondholders might *pro interesse suo*, become parties thereto, it was not essential that they should.—*McElrath v. P. & S. R. R. Co.*, 68 Penn. St. 37; *Shaw v. Norfolk, &c. R. R. Co.*, 5 Gray, 162; *Swift v. Stebbins*, 4 Stew. & P. 447. And since the bill avers that the bonds, each for the sum of \$1,000, which the trust deed was executed to secure, were issued to the extent of more than \$4,000,000, and the other complainants, who need not have made themselves co-plaintiffs, come in as “certain holders of said coupon bonds and past due coupons thereof, and *cestui que trusts* of the trustees aforesaid,” and on behalf of the other bondholders as well as of themselves, we think the demurrer, so far as it objects to the right of plaintiffs to maintain the suit, upon the allegations of the bill, was properly overruled.

The bonds were designed to be put in circulation and pass from hand to hand, by delivery merely, for which reason they were made payable to no person by name, but to “bearer.” No rule of law requires it to be shown by averment to whom such bonds, or any of them, were negotiated in the first instance; and it would rarely be possible for subsequent holders, who received them in the course of business, after they were put in circulation, to know to whom they were first delivered. The provision that the bonds might be “registered and made payable by transfer only on the books of the company,” did not itself make them non-negotiable by mere manual transfer; it was only a promise which entitled those who should become holders of them at any time to have them changed from that character, and converted into *registered bonds*, transferable only upon the books of the company. Neither the clause referred to, nor any thing else in them, made it necessary to show who purchased or became bearers of them in the first instance.

The objections that it is not shown how much was paid for the bonds, or when they were issued, is equally, and for like reasons, without foundation.—*Jones on Railroad Securities*, § 210. The case is not at all like that of *Reel v. Overall*, 39 Ala. 138. If there was any thing irregular or illegal in those particulars, it devolved on the defendant to set it up and show it.

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Nor need the averment that the company had failed for more than six months to pay the interest, also show further, that presentation had been made of the coupons for payment at the office or agency of the company where they were made payable. In regard to past due promissory notes, payable at a particular place, the law is well settled that if the defendant has suffered any loss by a failure to present them there, he must establish it in defense. And the Supreme Court of Pennsylvania has held that the same rule is applicable in an action for the whole amount of certain railroad bonds that should regularly have matured at a long future day, with interest to be paid semi-annually in the meantime, at a place designated, but subject to an agreement that if default be made three times, successively, in the payment of such interest, the principal also should then be presently due.—*Philada. & B. R. R. Co. v. Johnson*, 54 Penn. St. 127.

The sections of the Code which require conveyances to be "signed at their foot by the contracting party or his agent having a written authority," and dispense with seals to them, cannot have been intended to embrace conveyances by corporations, which, being unable to write and have signatures of their own, have always executed such instruments by causing their seals to be affixed to them. To have a seal for such purposes has not only been the uniform usage of these bodies politic, but the right "to use a common seal, and to alter the same at pleasure," is expressly conceded to them by our statutes.—Code of 1876, § 2019 (1767). And the act "to provide for the creation and regulation of railroad companies in the State of Alabama," approved December 29, 1868, under which the defendant company in this cause was, we presume, organized, provides that "all deeds made by such company shall be signed by the president, under the seal of the company."—Acts of 1868, p. 467, § 15. It cannot impair the validity of the deed that the name of the secretary was also subscribed to it, apparently in attestation of the affixing of the seal.

The objection that in this transaction of raising money and executing bonds and a mortgage to secure repayment of it, the railroad company acted *ultra vires*, and that, therefore, payment of the bonds and foreclosure, or sale of the mortgaged property, will not be enforced, cannot be sustained. The authorities referred to, which hold that corporations created for other and different purposes, may not lend money and do business after the manner of a bank, are not applicable to a case in which the corporation borrows money needed for its legitimate purposes, and gives securities therefor to the lender. To do this is one of the *implied* powers of such

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bodies.—*In re Patent File Co.*, L. R. 6 Ch. 83; *Curtis v. Leavitt*, 15 N. Y. 9; *Monu'l N'l Bank v. Globe Works*, 101 Mass. 57; *Hays v. Galion Gas Light Co.* 29 Ohio St. 330; Jones on Railroad Securities, § 5; *Kelly et al. v. Barnes et al.*, 58 Ala. 489.

If in agreeing to pay eight per cent. per annum interest, the lawful regular rate between individuals, upon the sum lent, instead of seven per cent., there was an usurious intent to violate the law concerning that matter, the contention thereupon is not to be raised by a demurrer to the bill.

We cannot concur in the proposition that the bonds and mortgage, or either of them, were not executed in conformity with the intention of the company, and are, therefore, invalid. Apart from the question whether they are not, indeed, the acts of the company itself, performed in the only manner in which it could execute such instruments, the resolution of the board of directors, prescribed only the denomination and amount of the bonds, what date and rate of interest they should bear, and that they should be made payable in American gold coin, free from government taxes in New York. It did not specify any time or event when they should mature. And in providing for securing their payment, by a deed of trust, "covering the road, franchise and property of the company from Girard to Tuscumbia, Alabama," it did not prescribe any of the other terms the deed should contain. All of the conditions specified were observed. And the additional provision in the deed, that a foreclosure sale of the property might be made to pay the entire debt, whenever the semi-annual interest thereon should remain six months unpaid, is no more at variance with the resolution than is the clause which makes the bonds otherwise mature on the 1st day of May, 1890, twenty years after their date. The presumption would consequently be, that the trust deed was to be completed in such form and with such stipulations as instruments of that kind ordinarily contain. And a "mortgage is usually so drawn that it may be foreclosed as soon as there is any default in the payment of any installment, either of principal or interest," secured thereby, and such a provision "is not considered a penalty, but an agreement as to the time when the debt shall become due."—2 Jones on Mort. § 1181, and cases there cited. It does not, therefore, appear that the mortgage was executed contrary to directions, or without sufficient authority.—*Skinner v. Dunn*, 9 Porter, 305; *Vanada v. Hopkins*, 1 J. J. M. 203; *Peter v. Farnsworth*, 15 Vermont, 155; Rawle on Cov. of Title.

We find no error in the decision of the Chancellor overruling the demurrer, and his order thereupon is affirmed.

[Alabama Gold Life Insurance Co. v. Sledge et al.]

Alabama Gold Life Insurance Company v. Sledge et al.

Bill in Equity to foreclose Mortgage.

1. *Witness; who incompetent.*—A party to a suit is not an incompetent witness, unless the case involves a direct immediate conflict between the rights of the living and those of the estate of a deceased person; and then he is only incompetent to testify as to transactions with and statements by the deceased. And the burden of showing his incompetency rests on the person objecting to his evidence.

2. *Evidence; what admissible.*—A party may testify as to transactions had with a partnership, of which one of the members has since died, although the personal representative and heirs of such deceased partner are parties to the suit; it not appearing the transaction was with the deceased partner.

3. *Payment; who must prove.*—It devolves on a party pleading payment of a prior encumbrance in support of his right to a foreclosure of his junior encumbrance, to prove that such payment has been made.

4. *Payments; rule as to application of.*—While a factor, making advances and receiving payments from time to time, can claim the balance only as an existing debt, and payments are applied by him to the debts in the order of time in which they accrue, the rule is not inflexible; and if a different application of payments is shown, or is to be inferred from the course of dealing between the parties, then the rule does not apply.

APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

The appellant, the Alabama Gold Life Insurance Company, filed this bill, and sought to foreclose a mortgage on certain real estate in the city of Opelika. The bill averred that the appellees, Sarah J. Sledge, Jas. C. Sledge and Jas. J. Smith, had executed to Swift, Murphy & Co. a mortgage on the same property embraced in the mortgage given the complainant, by the above named parties, and Mittie A. Sledge and Lizzie Smith. It is then averred that the mortgage to Swift, Murphy & Co. had been fully paid and discharged by the shipment of cotton to them by Sledge & Smith, a firm composed of James C. Sledge and James J. Smith, as agreed to by the parties to the mortgage; that notwithstanding the payment and satisfaction of this mortgage, Swift, Murphy & Co. had sold the property under a power of sale in their mortgage, and at such sale Charles J. Swift became the purchaser. The prayer of the bill is that the mortgage of Swift, Murphy & Co. be declared paid and satisfied, and that a foreclosure of the mortgage to appellants be decreed. Decrees *pro confesso* were rendered against all the defendants, except the senior mortgagees and the purchasers at the sale under it.

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The mortgage to Swift, Murphy & Co. was given to secure a note made by Sarah J. Sledge, James C. Sledge and James J. Smith, for the sum of two thousand dollars, which recited that "the above amount may be discharged by conveying to the said Swift, Murphy & Co., at Columbus, Ga., one thousand bales of cotton, on or before the first day of December next, upon which they are to receive the usual commissions, storage," &c. This note bears date Sept. 26, 1871. The mortgage to appellant was dated March 19, 1872. The answers of Swift, Murphy & Co., and Charles J. Swift, deny the payment of the mortgage to Swift, Murphy & Co. at any time, and aver the validity and fairness of the sale and of the purchase of Charles J. Swift. While the bill was pending, James C. Sledge died, and a revivor was had in the name of his personal representative and heirs. After his death, the defendants, Swift, Murphy & Co., and Charles J. Swift, filed interrogatories to the individual members of the firm, in relation to transactions between that firm and Sledge and Smith. The complainant objected to their competency, "under § 2704, and the acts of the General Assembly of Alabama amendatory thereof," on the ground that James C. Sledge, one of the defendants, is dead, and his administrator is a party to this suit, and although in the bill said administrator and Swift, Murphy & Co. are co-defendants, yet the pleadings in the cause show that their interests are not identical, but adverse to each other. Complainant objects to any and all statements by the said witness of or concerning any statements by or transactions with the said James C. Sledge, in any manner whatever, he being now dead." The interrogatories called for testimony of transactions with the firm of Sledge & Smith, in relation to the note and mortgage made to Swift, Murphy & Co. The witnesses testified that the note had not been paid in any manner; that the firm of Sledge & Smith had made various shipments of cotton to Swift, Murphy & Co. during the years 1871, '72 and '73, which were sold on their account and the proceeds remitted to them; that none of this cotton was shipped on or before December 1st, 1871, or at any time thereafter, in payment or discharge of said note, and that after the note fell due, Swift, Murphy & Co., refused to receive cotton in discharge of the same, as the contract had not been complied with; that Swift, Murphy & Co. had included the note in the accounts rendered Sledge & Smith, but that the latter firm had refused to allow it, and insisted on a settlement, without considering it an item of their account. James J. Smith testified that the note had been paid by shipments of cotton, and his was all the testimony for the complainant, tending to show payment of

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note to Swift, Murphy & Co. The Chancellor overruled the objections to the testimony of the witnesses for the defendants, and on the final hearing, dismissed the bill, from which decree this appeal is prosecuted.

W. H. BARNES & SON, and J. H. SWEARENGEN, for appellant. A junior mortgagee is entitled to succeed to all the equities of the mortgagor, and is entitled, on filing a bill to foreclose, to make proof of all payments made by the mortgagor, and have the benefit of them.—59 Barb. 239; 2 Hill, 522; 40 N. Y. 476; 8 Paige, 639; 50 Barb. 344; 11 Wend. 329; 9 Cowen, 233; 4 Ala. 452; *ib.* 477.

One who purchases under a power, the debt being void or paid, takes no title.—2 Hill, 566; 15 John, 443; 18 John. 441; 5 Hill, 272.

The note was included in the accounts between Sledge & Smith and Swift, Murphy & Co., and was more than paid by the shipment of cotton to them.—See, as to rule of payment in such case, 27 Ala. 445; 9 Cowen, 436; 5 Taunt. 596; 14 East, 239.

The evidence of witnesses, Murphy and Smith, should not have been admitted; they were testifying as to transactions with James C. Sledge, who was dead, and his estate was interested in the result of the suit.

F. M. WOOD, and J. M. RUSSELL, *contra*.—The evidence called for by the interrogatories to the witnesses, Swift and Murphy, does not relate to any transaction with James C. Sledge. They call for evidences as to dealings with a firm of which he is a member, and there is no law for their exclusion.

The evidence clearly shows that the note to Swift, Murphy & Co. was never paid. Whenever Sledge and Smith had funds to their credit, they were always drawn out, and not allowed to be applied to their payment. Sledge and Smith had the right to direct the application of the payment to any debt they saw proper; and if they chose to apply them otherwise than to the payment of that note, it was their privilege to do so. They never shipped cotton with directions to apply it to the payment of the note. It will be observed that one pleading payment, must prove it.

BRICKELL, C. J.—The original statute removing the common law disability of parties as witnesses, contained an exception of suits or proceedings by or against an executor or administrator, in which neither party, unless called by his adversary, was allowed to testify as to any statement by, or

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transaction with, the testator or intestate. The present exception is much more comprehensive in its terms, and refers rather to the *objects of* than to the *parties* to the suit. If the estate, to use the language of the statute, of a deceased person, is interested in the result of the suit, then neither party can testify as to transactions with, or statements by, such person. The reason and purpose of each exception, is the exclusion of the living from testifying against the dead, who cannot be heard in explanation, or in contradiction. A case cannot arise for the application of the present exception, unless it involves a direct, immediate conflict of interest between the dead and the living. It is only when such conflict exists, that it can be said the estate of the deceased person is interested in the result of the suit.—1 Whart. Ev. § 470. And then, the evidence must be of the character expressed in the exception—it *must be of transactions with, or statements by, the deceased*. Any party may testify to any material fact, if it does not fall within this species of evidence.—*O'Neal v. Reynolds*, 42 Ala. 197; *Thomas v. Thomas*, *ib.* 120.

The purpose of the present suit, is the vacation of a sale made by prior mortgagees, on the ground that the mortgage debt had been paid, and the foreclosure of the junior mortgage to the appellant. The mortgagors, the senior mortgagees, and the purchaser from them, are defendants to the bill, and the real controversy was between the purchaser and the senior mortgagees on the one hand, and the appellant on the other. The mortgagors did not engage in the litigation, but submitted to decrees *pro confesso*. If the exception can be said to embrace a suit of this character, it will restore, as to deceased persons, the common law rule of excluding witnesses, for or against whom the judgment would be evidence in another suit. An interest in the judgment or decree as evidence, is not the interest in the result of the suit, which authorizes the exclusion of a party as a witness. The result of the suit must diminish or enlarge the estate of the deceased person, before the disqualifying interest can be said to exist.

Nor does the evidence to which objection is made, consist of transactions with, or statements by, the deceased mortgagor and contractor. No statement made by him, no transaction in which he was the immediate, active agent, was proved. Transactions with a partnership of which he was a member, were shown, but for aught that appears, the surviving partner was the active agent in all these transactions, and fully capable of explaining, or giving contradictory evidence in reference to them. At common law the presumption was of the competency of witnesses, and the burthen of

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showing incompetency rested on the party objecting.—*Densler v. Edwards*, 5 Ala. 31. The same presumption now attaches as to a party, and he cannot be excluded, unless it is shown that he falls within the exception of the statute. We concur with the Chancellor, that the evidence of Swift and Murphy was admissible.

The *gravamen* of the bill is that the debt secured by the senior mortgage, had been paid before the mortgagees made the sale which it is prayed shall be vacated. The case as now presented, does not require us to consider whether, if this be true, it affects the title of the purchaser, or whether the bill, in any aspect, contains equity. These are questions which do not seem to have been discussed before, or passed upon by the Chancellor. The controversy seems to have resolved itself into one of *fact*—the prior payment of the mortgage debt. The burden of proving payment devolves on the party pleading it.—2 Green. Ev. 516. After an examination of the evidence, we have reached the conclusion attained by the Chancellor, that the payment of the debt is not proved. The general rule which is insisted on by the appellant, is conceded. A factor or commission merchant, from time to time making advances, receiving payments, and blending debits and credits together, in a common account, can claim the balance only as an existing debt, and the parts of the account have no longer a separate existence. The credits are by him applied to the debts in the order of time in which they accrue. The rule is not inflexible, and if a different application of the payments is expressly shown, or is to be inferred from the course of dealing between the parties, then the rule does not apply.—*Harrison v. Johnston*, 27 Ala. 445. A different application is expressly shown in this case. Whenever there was a fund to the credit of the mortgagors, which could have been applied to the mortgage debt, it was drawn by them from the mortgagees and applied to their own uses. The mortgage debt may have entered into the accounts rendered the mortgagors, but no credit to which they were entitled, was applied to its payment.

The decree is affirmed.

[Shulman, Goetter & Weil v. Fitzpatrick et al.]

Shulman, Goetter & Weil v. Fitzpatrick et al.

Bill in Equity to foreclose Mortgage.

1. *Statutory separate estate; what conveyance of, inoperative.*—The statutory separate estate of the wife may be sold by the husband and wife jointly, in the mode prescribed by the statute; but neither one nor both can pledge or mortgage it. The only power conferred by law is to sell, and this power is strictly and narrowly enabling.

2. *Same; incidents of husband's trusteeship of.*—The husband must apply the income of the wife's property to the maintenance of the family, and if he fails in this duty he may be removed from the trusteeship, and in such case the wife will have the same control over her estate, and the rents, issues and profits thereof, as if she were a *femme sole*; and her power of disposition is akin to, and as great as that which she could have in a court of equity over her equitable separate estate, and she may pledge or mortgage it.

3. *Husband; removal of, from trusteeship*—Where a decree on a bill filed by the wife against the husband—alleging the receipt of the *corpus* of her statutory separate estate, and praying that he be decreed to have no further control over her estate, and that she may be invested with the rights of a *femme sole* as to such property—declares her entitled to the relief prayed, ascertains the amount due the wife, and directs the issuance of execution against the husband for the amount thus ascertained, and is silent as to whether the husband is removed or not, such decree does not remove the husband from his trusteeship or clothe the wife with the rights of a *femme sole* as to her separate property.

APPEAL from Macon Chancery Court.

Heard before R. F. LIGON, Esq., as special Chancellor.

The bill in this case was filed by appellants, Shulman, Goetter & Weil, against the appellee, Joseph Fitzpatrick, and the administrator and heirs of his deceased wife Mary, F. Fitzpatrick, and sought to foreclose a mortgage on certain lands in Macon county, Alabama, made to the appellants by the said Joseph and Mary F. Fitzpatrick, on the 29th day of January, 1872. It appears that in the year 1871, Mrs. M. F. Fitzpatrick, by her next friend, filed her bill in the Chancery Court of Macon county, against her husband, said Joseph Fitzpatrick, in which, after alleging the receipt by him as husband of a large amount of property belonging to her statutory estate, and that he has become financially embarrassed, she prays, among other things, that "her said husband shall no longer have any control over her estate, and the rents, issues and profits thereof, and that she shall have the same control over the rents, issues and profits thereof, as if she were a *femme sole*, and may sue and be sued in her own name, and that the Register ascertain and report the amount of

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money belonging to oratrix used by her said husband." This bill was answered by her said husband, and a decree rendered upon bill and answer, without further proof. In the final decree, the Chancellor declares "that the complainant is entitled to the relief prayed in her bill," and after confirming the report of the Register as to the amount due complainant, directs that execution issue against said Fitzpatrick, to be levied on his property, to satisfy the decree. A sale of the lands in controversy was had under this decree, at which Mrs. Fitzpatrick became the purchaser, and at the date of the mortgage, sought to be foreclosed, she held and claimed the lands therein embraced, under the title thus derived. The Chancellor held that they constituted a part of her statutory separate estate, and that the husband had never been removed from his trusteeship, and, consequently, that the mortgage to appellants was inoperative, and dismissed the bill. From that decree this appeal is prosecuted.

H. C. TOMPKINS, for appellants.—The decree of the Chancellor that Mrs. Fitzpatrick was entitled to the relief she prayed for, on a bill which expressly prayed "that her said husband shall no longer have any control," &c., and "that she shall have the same control as if she were a *femme sole*, is certainly a decree removing the husband from his trusteeship, and clothing her with the full powers of a *femme sole* as to her separate estate. In ascertaining the effect of decrees, it is always permissible to refer to the pleadings, and *a fortiori*, this must be done when the decree refers to the pleadings, and is meaningless without such reference.—*McLemore v. Nuckolls*, 37 Ala. 662; *Huffacker v. Berney*, 8 Ala. 87. If this decree removed the husband from his trusteeship, the wife had the power to make the mortgage and bind the property.—*Bell v. Locke*, 57 Ala. 242.

GRAHAM & ABERCROMBIE, *contra*.—The decree did not remove the husband from the trusteeship, and, consequently, did not clothe Mrs. Fitzpatrick with the rights of a *femme sole*, or render her capable of mortgaging her separate property. The presumption that he was removed by such a decree as was rendered, will not be indulged; there was no proof of his incapacity or infidelity to the trusts which the law had cast upon him, and nothing which authorized his removal. The husband is the trustee of his wife, bound by all the rules of law and equity governing trust property.—See 50 Ala. 509; 45 Ala. 337; 51 Ala. 318; *Marks v. Cowles*, 53 Ala. 320. The *cestui que* trust may compel the trustee to account for the trust funds, or to execute trust duties without

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having him removed from the trust.—Hill on Trustees, 518 *et seq.* There must be a clear, distinct removal of the husband, in order to clothe the wife with the powers of a *femme sole*.

BRICKELL, C. J.—The statutes, and the constitutional provisions succeeding them, creating the separate estate of a married woman, promise to be as fruitful source of contention, as has been the statute of frauds. So far as this case involves the interpretation, or the construction, or the operation of these statutory and constitutional provisions, a safe anchorage is found in an unbroken current of judicial decisions, as obligatory on the judicial conscience, as the statute and the mandate of the constitution. While husband and wife may by an instrument in writing, executed in the mode prescribed by the statute, *sell*, they cannot *pledge*, or *mortgage*, the separate estate of the wife. The power conferred by the statutes and the constitution, (and it is *strictly, narrowly* enabling,) is to *sell*, converting the thing sold into money, or its equivalent, and no other power can be exercised.—*Peeples v. Stolla*, 57 Ala. 53. The mortgage to the appellants sought to be foreclosed, conveying the statutory separate estate of the wife, is voidable because of the incapacity of the husband and wife to execute it. Infancy of either or both, would not incapacitate them, and avoid the mortgage so positively.

The relation of husband and wife, as it was defined at common law, the statutes and the constitution preserve. A destruction of it would have offended the moral sense of the community, and would have affected the whole social organization. The capacity of the wife to hold property, real or personal, is enlarged, but it is simply a capacity to *hold*, without a power to dispose, or to manage, control, or to take the rents and profits, or the income. This remains in the husband, as at common law; but to accomplish the purposes of the statute, he takes these not only as husband, but as trustee, freed from all liability to account for them. The liability of maintaining the family, the common law imposes on the husband, remains undiminished, and the right its inseparable incident, to regulate and control the domestic expenditures. The income, the profits of the estate the wife holds, he must apply to the maintenance of the family. If he fails in the duty he may be removed from the trusteeship of the estate of the wife; and those who supply the wants of the wife, or of her family, of the children of the marriage, if facts exist, which at common law, would render the husband liable *in invitum*, have a legal remedy against the estate.

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Code of 1876, § 2711. Whenever the husband from any cause becomes incapable of, or unfit for the discreet management and control of the statutory separate estate, the wife may procure his removal from the trusteeship. When he is removed by a decree of the Court of Chancery, "the wife shall have the same control over her estate, and the rents, issues and profits thereof, as if she was a *femme sole*, and may sue and be sued in her own name, but the husband is not liable for her acts or contracts."—Code of 1876, §§ 2717–18. The result of the removal of the husband from the trusteeship, is, that as to her statutory separate estate, the wife becomes a *femme sole*, and her power of disposition is akin to, and as great as that which in a court of equity, she could have over her equitable separate estate. She may *pledge* or mortgage it as security for her own debt or the debt of her husband.—*Bell v. Locke*, 57 Ala. 242.

It is insisted for the appellants that the true construction, and the real operation of the decree of the Court of Chancery, under which Mrs. Fitzpatrick became the purchaser of the lands conveyed by the mortgage, was the removal of her husband from the trusteeship of her statutory estate, and thereby she became a *femme sole*, with capacity to execute the mortgage. The decree is silent as to the removal of the husband from the trusteeship of the statutory estate of the wife. It proceeds no farther than to ascertain and compel the husband to account for so much of the estate as he had converted. It is manifestly a matter of unmixed difficulty to determine what particular facts attending a conversion by the husband, of the statutory estate of the wife, would justify or require his removal from the trusteeship. Though a trustee, he is husband, and as husband he is converted into trustee. The peace of the family—the harmony of the relation would be disturbed, if all his acts were to be measured by the rules by which the conduct of a trustee not sustaining this relation are measured. A trustee, the trust itself creating the fiduciary relation, resting under a large liability to account, would be derelict in duty often, and the dereliction would afford just cause for his removal, when the same conduct in the husband would be innocent. Each case rests in its own particular facts, and when unfitness is not chargeable, the intention of the husband in the particular acts which render him liable to account as a trustee to the wife, will control in determining whether the extreme measure of removing him from the trusteeship shall be adopted. Certain it is, in this instance, the Court of Chancery did not expressly adopt it. To infer it by argument or construction from the decree, would be in violation of the principle, that an estoppel

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is not to be inferred by argument, and that a judgment or decree is conclusive of matters only, which are decided, or necessarily involved in the issue and decision. If the husband had appealed from the decree, and assigned for error, that he was improperly removed from the trusteeship of the statutory separate estate of the wife, the answer would have been without hesitation, the assignment was not supported by the record—that no such decree had been rendered. The same answer must now be made, and the mortgage can derive no support from that decree—it does not enlarge the capacity of the husband and wife to alien the statutory estate of the wife. We concur in the decree of the Chancellor, and it is affirmed.

Phillips, Executrix, v. Smith.

Proceedings in Probate Court to compel Executrix to give Bond.

1. *Person interested in estate; who is.*—A creditor is a person interested in the estate, within the meaning of the statute authorizing requirement of security from an executor whom the will exempts from giving bond.

2. *Debt against estate; how far should be enquired into.*—Where a creditor seeks to require bond under this statute, the court should entertain no inquiry as to the validity of the debt, further than to ascertain whether there is a *prima facie* liability against the estate.

3. *Amendment; what not a departure.*—A petition to require an executor to give bond, like other pleadings in civil causes, is amendable under our statute, at any time before final decree; and where the original petition averred an interest as a judgment creditor, an amendment describing the judgment, and averring also ownership by transfer of a judgment against the executrix, is not a departure.

4. *Proceedings to require bond of executrix; who may maintain.*—It is not essential that a creditor instituting proceedings under the statute, should be able to prosecute suits at law in his own name on the debts he claims; though his claim be such that if driven to suit, he would have to use the name of some other person, yet, if he have the right to maintain such suit, and can receive payment and discharge the debt, he is interested in the estate, and may maintain the application in his own name.

5. *Decree; when should be affirmed.*—The evidence presenting a clear case for requiring security from the executrix, the court declines to consider in detail the rulings upon numerous pleas and motions to strike from the files, and exceptions to evidence, but affirms the order requiring the executrix to give bond.

APPEAL from Tallapoosa Probate Court.

This was an application by the appellee, Smith, to compel the appellant, Sarah Phillips, as executrix of James D. Phillips, deceased, to give bond and security as such executrix, the will of the testator having exempted her from giving any bond. Petitioner alleged that he was a creditor, and that

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his interests were endangered for want of such bond. The Probate Court, on the first hearing of the application, dismissed the petition; which judgment was reversed by this court, at the December term, 1875, and the cause remanded. See report of the case, (*Smith v. Phillips*, 54 Ala. 8,) which states the nature and contents of the petition, then before the court.

After the cause was remanded, and on the 26th day of March, 1876, appellee filed a petition, praying the same relief as the former one, which differed from the petition previously filed, in that it set out more at length the nature of his claims against the estate. This petition averred that petitioner was "a judgment creditor of said estate, which said judgments were rendered by the honorable judge of the Probate Court of Tallapoosa county, on the 11th day of August, 1873," [here follows *verbatim* copy of the judgment in favor of himself and wife, against appellant as executrix of the testator, for \$294 95-100.] Petition then avers that said judgment is of full force and the property of petitioner. The petition then avers that petitioner is the owner of another judgment rendered by the same court, on the same day, for the same amount, against appellant as executrix of the testator, in favor of William T. Coker, who assigned it to petitioner. Both of these judgments were rendered on final settlement by appellant as executrix of her testator's administration of the estate of Thos. W. Coker.

The petition avers that appellant made no settlement within eight years; had rented out the lands, and failed to account for the rents and profits, and refused to pay the petitioner's debts, though the estate was not insolvent. Notice of the filing of the petition, and of the day set for the hearing, and requiring appellant to show cause, &c., was regularly served upon appellant, as though it was an entirely new proceeding. On the day set for the hearing, the executrix appeared, and pleaded in abatement the pendency of the former petition. The petitioner neither demurred nor took issue on this plea, but asked that said petition be considered as amendment of the petition filed in 1874. The executrix objected to the allowance of this motion, on the ground that the present was an entirely new petition; but the court overruled the objection, allowed the petition as an amendment, and the executrix excepted. The executrix then moved to dismiss "said petition and proceedings, because, by allowing said petition of March, 1876, as an amendment, the cause is out of court, no notice or proceedings having been had on said petition of 1874 since that time, and the reversal by the Supreme Court; and because the defendant was notified to

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answer the petition of 1876 as an original proceeding." The court overruled the motion, and the executrix excepted. The executrix then demurred to the petition as amended, on the following grounds: 1st. The amendment is a departure from the original cause. 2d. The amendment is repugnant to the original, and sets forth a new and distinct cause of complaint. 3d. Said petition is a misjoinder of causes of complaint. These several grounds of demurrer were overruled, and the executrix excepted. The defendant then moved "to strike out from said petition, the several specifications of maladministration," which motion the court overruled, and the executrix excepted.

The petitioner then offered in evidence, the decrees rendered on final settlement by appellant of her testator's administration of the estate of Thomas W. Coker, which showed the rendition of the judgments, in favor of Smith and wife, described in the petition. The executrix objected to this evidence, on the ground that the petition averred that Thos. J. Smith was a creditor; whereas, the evidence showed that he and his wife were creditors. The objection was overruled, and the executrix excepted. A similar objection was made to the introduction of the decree, showing the judgment in favor of W. T. Coker, and exception reserved to the overruling of this objection.

The petitioner then introduced the appraisement of the property of the estate, together with evidence sustaining the charge of maladministration, showing that the executrix had not made any settlements, had converted personal property of the estate, and allowed lands to be sold for taxes. The court made an order requiring the executrix to give bond, &c., and she appealed. Each of the rulings to which exception was reserved, is now assigned as error.

G. W. GUNN, and W. H. BARNES, for appellant.

OLIVER & SMITH, *contra*.

BRICKELL, C. J.—The case is involved by a singular confusion of unnecessary pleading, consisting of a plea in abatement, motions to strike pleadings from the file, demurrers and pleas in bar, accompanied by numerous objections to the admission of evidence. We decline to travel through the record, searching out the various rulings of the Court of Probate, and determining whether each of these are strictly correct, or whether any of them would furnish ground of reversal, if they had been made in another tribunal, in a different proceeding, governed by different rules, which have but little

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application to proceedings in the Court of Probate. The merits of the case lie within a very narrow compass, and the Court of Probate in its decree did not mistake them.

The proceeding is an application by a creditor, under the statute, (Code of 1876, § 2367-8, which were §§ 2005-6 of the Revised Code,) to compel an executrix to give security, who is relieved by the will of the testator from that necessity, upon allegations showing his interest, and that it was endangered for the want of security. When the case was before this court, at a former term, (*Smith v. Phillips*, 54 Ala. 8,) we held a creditor was a party interested in the estate, entitled to apply under the statute for security from the executrix. We further said: "No petition by a creditor, under this statute, ought to be entertained which does not set forth the debt on which his relation as a creditor depends, with the precision and certainty essential in a declaration or complaint in an action at law against the personal representative." But we were careful to say: "No controversy as to the existence of the debt should be allowed beyond what may be necessary to satisfy the court of its probable validity. The judgment the court may render cannot fully determine its validity, and all the inquiry the court may make in reference to it, should be directed to the single question, is the applicant *prima facie* a creditor? If there are defenses against the debt, they must be inquired into and determined in a different proceeding, and must not embarrass this remedy." The petition not then describing with reasonable certainty, the judgments or decrees claimed as debts against the estate, which were the foundation of the right of the petitioner as a creditor, was declared insufficient, but amendable in the Court of Probate. All pleading in any court, in a civil cause, is amendable under our statutes and practice, at any time before final judgment or decree. There was no discontinuance of the original petition, and there is no departure from it in the amendment.

It is not essential that the creditor instituting this proceeding, should be able to prosecute suits at law in his own name on the debts he claims. It may be that he has only an equitable or beneficial interest, and that a suit at law would necessarily be prosecuted in the name of the party having the legal interest; yet, if he have the right to use the name of such party, if driven to a suit at law, and his right to receive payment of, and discharge the debt, is clear in his own name, he may institute his proceeding. The remedy is intended for the protection and benefit of the creditor having the real interest—he alone may suffer from the want of security. Judgments are incapable of assignment, so as to ena-

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ble the assignee to maintain actions at law thereon, except in the name of the party in whose favor the judgment is rendered. The assignment, however, carries the whole beneficial interest, and full authority to collect and discharge it. For all purposes, the assignee has the right to use the name of the assignor, in enforcing the judgment. As assignee of the decree in favor of Coker, the appellee could properly have instituted this proceeding. The decree in favor of himself and wife was joint, and though if suing at law thereon, the wife must have joined, the rule nor its reason have any application to this proceeding—he is a creditor, and it is not material that he sustains that relation jointly with another.

On the facts of the case, it is manifest that the safety of the appellee as a creditor, required that the appellant should give security as executrix. Having examined the merits of the case, and having ascertained the appellant has shown that he is *prima facie* a creditor, and that his interests are endangered for want of security, we decline further notice of the numerous rulings of the Court of Probate, which could not, if erroneous, have changed the results, or injured the appellant.

Affirmed.

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Bill in Equity to Declare and Enforce Trust.

1. *Parol trust; what evidence necessary to prove.*—Parol trusts, in opposition to the terms of a written instrument, can be enforced only on clear and precise allegation, supported by plain and convincing proof; and a closer correspondence between the pleadings and proof is required in such case than in ordinary causes, for the reason that they are raised and enforced in opposition to the terms of a written instrument.

2. *Code, § 2199 of, construed.*—Under our present statute (Code, § 2199,) and since the Code of 1852, a trust in lands, not arising by implication or construction of law, can not be established by parol; but must be created by instrument of writing.

3. *Same.*—An express trust, that a grantee of lands, conveyed by deed absolute, expressing on its face a pecuniary consideration, shall hold for the use of the grantor and reconvey to her on request, can not be created by parol; and in the absence of clear evidence of fraud, imposition or mistake, at the time of the execution of the conveyance, the grantee's repudiation of the verbal promise to hold for the use of the grantor, and to reconvey, is not a fraud against which a court of equity can relieve.

4. *Cases commented on and criticised.*—The cases of *Kennedy v. Kennedy*, (2 Ala. 571,) and *Bishop v. Bishop*, (13 Ala. 475,) were decided prior to the present statute against the creation of parol trusts in lands; and the latter involved such a trust in personal property, which is not within the prohibition of our own or the English statute of frauds. The case of *Barrell v. Hanrick*, (42 Ala.

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60,) originated since the enactment of our present statute; but the court, without deciding how far it would feel bound to follow it, in a case similar in its facts, declares that "it can not be regarded as establishing the proposition, so broadly asserted, that the mere violation or repudiation of a parol promise or trust, offensive to the statute, is a fraud which will authorize a court of equity to relieve against the words of the statute."

5. *Secret trust; what requisite to establishment of.*—When a party seeks to establish and enforce a secret trust on the face of an absolute deed, it must be shown that the purpose was an honest one; and where an intention to screen property from the vigilance of creditors of the husband is averred by the wife, and the rules of law arising from such conduct are sought to be avoided, on the ground that the property was not subject to the demands of such creditors, it is incumbent on the wife to show clearly the absence of such liability.

APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

The bill in the present case was filed by the appellant, Mrs. Elizabeth Patton, wife of J. O. Patton, against Edwin Beecher and W. L. Chambers. It alleged that she was, prior to the 30th of October, 1869, seized in fee of a certain lot in the city of Montgomery, which was her statutory estate. On the 3d day of July, 1871, at the instance of her husband, who had failed in business and become apprehensive that the property might be subjected to payment of his debts, she and her husband executed a deed of bargain and sale of the premises to Edwin Beecher, which recites a consideration of four thousand dollars paid to her. She avers that no consideration was in fact paid her, "and that said deed was delivered to said Beecher and received by him simply to hold said property for oratrix, and as in no manner passing any interest or title in said property to the said Beecher;" that Beecher was an intimate friend and member of the family, and oratrix placed the utmost confidence in his verbal undertaking then made to her, to hold the property in trust for her, and not record the deed, but reconvey to oratrix whenever requested; and for these reasons she took no written defeasance.

Beecher afterwards failed in business, without having reconveyed, and made an assignment to his co-defendant Chambers, on the 28th day of April, 1876. The bill prays that the deed to Beecher be declared void and canceled, or that Chambers be required to reconvey, and for general relief.

The other facts are fully stated in the opinion.

This appeal is taken from a decree of the Chancellor dismissing the bill.

W. A. GUNTER and D. T. BLAKEY, for appellant.—The undoubted facts of this case show that Mrs. Patton, a married woman, for \$2,000 cash and for an equal amount upon credit, received a conveyance of the lot in question from Miss Dun-

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can. This was enough to invest her with a separate statutory estate in the property. As the conveyance to her is not impeached by any creditor of her husband, it is useless to trace her title further back, and it is idle to talk about the probability or fact, if it be established, that the cash consideration of the conveyance was furnished by Mr. Patton, and that the deed was fraudulent as to *his* creditors. Neither does it make any difference if Beecher paid the credit portion and gave it to Mrs. Patton for a consideration furnished by Mr. Patton. Patton's creditors do not complain, and no one else can.—*Terry v. Keaton*, 58 Ala. 667; *Paulk v. Wolfe, Gillespie & Co.* 34 Ala. 543-4.

The title and property being in Mrs. Patton, she was under absolute disability to convey, except upon a sale.—*Garrett v. Lehman, Durr & Co.*, 61 Ala. 391; 59 Ala. 436-40.

The subsequent conveyance, then, to Beecher, upon the expressed consideration of \$4,000, when nothing was paid or agreed to be paid, would, if consistency is regarded in judicial decisions, be utterly void.—*ib.*

And as Mrs. Patton is in possession, and as parol evidence is necessary to establish the invalidity of the deed, it would constitute a cloud on the title, removable in chancery.—*Hurt v. Lockett*, 57 Ala. 198; *Rea v. Longstreet et al.*, 54 Ala. 670.

The agreement, then, by Beecher, to hold the title in trust for Mrs. Patton, is precisely the trust which the law would have *implied* against him.

An express agreement to perform a *legal duty*, co-extensive with the implication of law, growing out of the facts, is good always and may be declared on.—*Smith on Contracts*, 115 *et seq.*

The trust, therefore, sought to be enforced in this case, is not against the spirit or words of § 2199 of the Code, but is expressly excepted from its operation.

It is idle to say that a married woman can not impeach the consideration of a deed made by her, as it is done every day and is sustained by the courts.—*Conner v. Williams*, 57 Ala. 131; *ib.* 122.

There never is an estoppel, between the original parties to a transaction, or their assignees, not standing as *bona fide* purchasers, to disclose facts showing a want of *capacity* to do an act.

But, if the recital of the consideration is binding on the complainant, it is equally so on Beecher, the grantee, and upon his assignee Chambers, who can not claim as a purchaser.—*Twelves v. Williams*, 3 Wharton, 485; 2 Lead. Cases in Eq. 104-5-6.

And, as it is clearly shown that no part of the alleged con-

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sideration of \$4,000, has ever been paid, the complainant, under the general prayer for relief, is entitled to have her vendor's lien enforced. The case of *Leman v. Whitley*, 4 Russ. 423, is directly in point.

In that case the court refused to enforce the parol trust, but enforced the vendor's lien. In that case there was no want of capacity in either of the parties to convey. The deeds were therefore operative, and, therefore, no implication of trust on the part of the grantee to hold for the grantor. Here the grantor, having no capacity to make a binding conveyance, except upon a sale, the grantee must, if the transaction is not a sale, stand as a trustee *in invitum*. The implication of trust in this case distinguishes it from the case in 4 Russ. *supra*, and if not, then, that case is an authority for enforcing the vendor's lien.

No matter what the motives of Patton or Beecher may have been, in inducing the conveyance to Beecher, they can not be imputed, even if proved, to Mrs. Patton. She is a married woman, deemed to be absolutely *sub potestate visi*, and incapable of participating in any fraud resulting from *design* respecting her separate statutory estate.—57 Ala. 321; 59 *ib.* 436-7; *Trust Co. v. Sedgwick*, 7 Otto, 308; 5 *ib.* 3.

She may sell in the form prescribed by law, because the statute *enables* her to do so. In other respects she remains under the disability, and, consequently, the protection of the common law.—57 Ala. 321; *ib.* 122; 59 *ib.* 436-40; 7 Otto, 308; 5 *ib.* 3; 61 Ala. 394.

The simple facts of the case, then, show that a married woman, seized of a statutory estate, is *induced* by her husband and Beecher to convey it *without any consideration*, and the Chancellor, in spite of the law, which says she can sell, but is under disability in other respects, and in spite of the decision of *Barrell v. Hanrick*, 42 Ala. 60, on the construction of § 2199 of the Code, holds that the conveyance is operative, and that the married woman may thus be defrauded of her property and the policy of the law defied.

CLOPTON, HERBERT & CHAMBERS, *contra*.—Seeking relief, as the appellant does, against the creditors of Beecher, she must be held to the strictest rules of pleading and proof. She has placed herself under peculiar obligations to be distinct and explicit in her averments, by stating the motive with which she made the conveyance, and she should, by averment and proof, negative the presumption that the money she invested could have been subjected to the payment of her husband's debts.—6 Ala. 718; 30 Ala. 352. It will not do to contend that a wife may not be guilty of fraud, or be

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estopped by it.—See *Drake & Wife v. Glover*, 30 Ala. 256. Mrs. Patton was then a person who, under the laws of Alabama, was “*capax doli*.” She conveyed the property in such a manner as to convey title, and if she was making a pretended sale to avoid the supposed danger of the land being subjected to her husband’s debts, it is an executed contract, which, as between the parties thereto, a court will not disturb.—8 Por. 351; 1 Ala. 54; 24 Ala. 513; 27 Ala. 336.

No trusts concerning lands, and not in writing, “whether implied by law, or created or declared by the act of the parties, can defeat the title of creditors or purchasers for a valuable consideration without notice.—Rev. Code, § 1591.

Chambers, in this case, represents the creditors; his title is their title. “All the legal interest vests, nominally, in the assignee, but substantially in the *cestuis que trusts*, or creditors. . . . The assignee has not even a beneficial interest in the estate. He is seized for others; not for himself.”—Bump. on Fraud. Con. 352. Before the Code of 1852, statutes similar to this had been passed, the word “creditors,” merely, being used, and not “title of creditors.” By looking at the cases referred to in *Fash v. Ravesies*, 32 Ala. 251, it will be seen that the courts had settled upon *who* were the creditors meant, by confining it to creditors who had at law obtained a lien. This was simply because it would not do, as will be seen from the reasoning in the earlier cases, to prevent all sales of property by persons indebted; and so the line was drawn to include only creditors who had by law obtained a lien. This being the well settled law, the act of 1852 was passed. The different phraseology used means something, and it means to declare, by enactment, the rule laid down by Chief Justice MARSHALL in *Bayley v. Greenleaf*, 9 Wheat. 46.

The trust sought to be established in this case, is clearly within the letter and the spirit of the statute; it is not in writing, and to grant the relief prayed for is to repeal the statute, or strip it of all efficacy, by establishing a trust resting solely in parol, in the teeth of a deed, absolute in its terms, conveying the property for a sufficient consideration.—102 Mass. 24; 1 Watts, 163; Browne on Frauds, 94.

BRICKELL, C. J.—The bill is filed by the appellant, a married woman, to establish and enforce the execution of a parol trust, in opposition to the terms and legal effect of an absolute deed of lands, expressing an adequate consideration, executed by her and her husband in the mode prescribed by the statute to pass her contingent right of dower in the lands of her husband, or to pass her separate estate, whether it is

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statutory or equitable. The facts averred in the bill are, that she was seized in fee of the premises, having purchased them with moneys held by her as her statutory estate. On the 3d day of July, 1871, at the suggestion, and on the persuasion of her husband, who had become insolvent, and who was apprehensive his creditors would attempt to subject the premises to the payment of his debts, she executed the conveyance in question to Edwin Beecher, (an inmate of her household, who for several years had been received and treated as a member of her family, and was a trusted, confidential friend,) without consideration, and upon his promise that the conveyance should not be recorded, and that he would hold for her use, and, on request, would reconvey to her, or surrender the conveyance to be canceled. The evidence in support of these averments proceeds from Beecher, the appellant, and her husband. Beecher states there was no consideration for the conveyance, and while *he can not explain*, (whether from a want of memory, or an unwillingness to do so, he does not say,) why the conveyance was made to him, he states there was no consideration for it, and *the intention* was the lot should be held for the benefit of appellant. The appellant and her husband state there was no consideration for the conveyance, and that its execution was at the instance and on the persuasion of Beecher, who expressed fears that the creditors of the husband would endeavor to sell the premises, and that to save herself and her family a home, she had better make the conveyance, he would not have it recorded, and at any time would cancel it, or reconvey to her. There is a variance between this evidence and the averments of the bill. Whatever of influence, or persuasion was exerted, and whatever of representation was made, to induce the appellant to execute the conveyance, the bill attributes solely to the husband, while the evidence imputes it to Beecher. This, and other variances between the pleading and the proof, would embarrass the claim of the appellant to relief, if it could be supported as a parol trust, either express, or resulting by implication of law. When such trusts are supported and enforced, it is only on clear and precise allegations, corroborated by plain and convincing evidence. A closer correspondence between the pleadings and proofs is required than in any other, except the analogous cases of bills for the reformation, or for the specific performance of contracts. The reason is obvious, they are raised and enforced in opposition to the terms of written instruments, which must be presumed to speak the truth, expressing fully and correctly the intention of the parties, until the presumption is removed by precise pleading of

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facts, supported by evidence that leaves on the mind no just doubt.—1 Story's Eq. § 152.

The material question is, however, whether an express trust, that the bargainee or grantee of lands conveyed by deed, expressing a pecuniary consideration, shall hold for the use, and on request of the bargainor reconvey to him, can be created and proved by parol. For there is no evidence that this trust rested in writing; on the contrary, it is averred in the bill, that because of the intimate relations between the parties, and the great confidence reposed in Beecher, no writing disclosing the character of the transaction was taken. At common law, a use or trust, could be raised upon a conveyance of lands, by deed, or by writing, without seal, or even orally, if the rule of evidence prohibiting the change or contradiction of a writing by parol was not infringed.—Perry on Trusts, § 75; Hill on Trustees, 55; 2 Story's Eq. § 971. Contracts, if a statute does not intervene, may be partly expressed in writing, and partly in parol. If the writing does not set out the entire contract, parol evidence of the part omitted may be received, and it is not necessary that the writing should expressly and directly rebut the presumption that it contains the entire contract.—*Brown v. Isbell*, 11 Ala. 1009. Or a parol agreement, contemporaneous with a written contract, though it may depend upon the latter and relate to the same subject matter, if separable from it, may be proved and enforced.—*Garrow v. Carpenter*, 1 Port. 359; *Mills v. Geron*, 22 Ala. 669; 2 Whart. Ev. § 1015. A trust, resting in parol, was not considered as affected by this rule of evidence, because it did not alter the legal operation of the conveyance, which had full effect in passing at law the absolute title. The trust did not alter, add to, or explain the deed, but was an incident, or a separable part of the contract, not reduced or intended to be reduced to writing, which a court of equity enforced as binding on the conscience of the party.—*Shelton v. Shelton*, 5 Jones Eq. 292; *Lee v. Browder*, 51 Ala. 288. When, however, a statute intervenes and declares that contracts must be made in a particular mode, or must be created or proved by writing, the common law rules of evidence are superseded, and the statute must be obeyed.—Perry on Trusts, §§ 78–86.

The seventh and eighth sections of the English Statute of Frauds, (29 Charles, 2, 23,) avoided all *declarations or creations of trusts or confidences* of any lands, tenements, or hereditaments, unless the same were manifested and proved by some writing, signed by the party who was by law enabled to declare such trust, or by his last will in writing; with a saving in favor of trusts or confidences, arising or resulting

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by implication or construction of law. The first, second and third sections of this statute, relating to the creation and transfers of estates or interests in lands, were not in terms adopted in this State; but a statutory provision, having in view the same object, expressed in these words: "No action shall be brought upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof, for a longer term than one year, unless the promise or agreement, upon which such action shall be brought, or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized," was adopted in 1803, and continued of force until the adoption of the Code of 1852.—Clay's Dig. 254, § 1. Until that Code was adopted, there was no statutory provision in reference to the mode of creating, or declaring, or proving, uses, or trusts, or confidences of lands. The creation, declaration or proof of these stood as a common law, of which the English Statute of Frauds, having been enacted in 1677, was not a part. The principle being, that only such English statutes as were enacted before the emigration of our ancestors, which are applicable to our situation, and not inconsistent with our institutions, constitute a part of our common law.—*Carter v. Balfour*, 19 Ala. 814; *Horton v. Sledge*, 29 Ala. 478. The statute in reference to contracts of sale, or lease, did not exclude the creation or declaration of uses or trusts by parol, and consequently proof of them by unwritten evidence. It was confined in operation to the contracts specified, and had no influence on uses or trusts embraced by the seventh and eighth sections of the English statute.—*Bank of U. States v. Carrington*, 7 Leigh, 566; *Fleming v. Donahue*, 5 Ohio, 255; *Ready v. Keanley*, 14 Mich. 215; *Osteman v. Baldwin*, 6 Wallace, 116; *Hargraves v. King*, 5 Ired. Eq. 430; *Clouinger v. Summit*, 2 Jones Eq. 513; *Shelton v. Shelton*, 5 Jones Eq. 292; *Wilburn v. Spofford*, 4 Sneed, 705; *Haywood v. Ensley*, 8 Humph. 260; *Perry on Trusts*, § 75.

The seventh and eighth sections of the English statute, were as follows: "All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such

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trust or confidence shall be of the like force and effect as the same would have been, if this statute had not been made; any thing heretofore contained to the contrary notwithstanding."—Browne on Statute of Frauds, 78. The Code of 1852, § 1320, (Code of 1876, § 2199,) declares: "No trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating, or declaring the same, or his agent, or attorney, lawfully authorized thereto in writing." Between this and the English statute, there are differences of phraseology, not affecting any question now presented, and whether these differences will require a difference of construction, it is not now necessary to discuss. The statutes have a common purpose—the requisition of written evidence of trusts concerning lands, and the prohibition of the enforcement of such trusts resting merely in parol; unless they fall within the exception of *trusts resulting by implication or construction of law, or which may be transferred or extinguished by operation of law*.

The kinds of trusts which these statutes embrace—which the English statute requires shall be *manifested and proved* by writing, and which our statute requires shall be *created* by writing—is made apparent by the exception. All other trusts than such as *arise or result by implication or construction of law*, are within its operation. Trusts arising or resulting by implication of law may be excluded by, but they do not arise from, nor are they dependent upon the agreement of the parties. From facts proved, without any declaration or agreement of the parties, the law raises the trust. A common case, is when A. purchases lands with the money of B., taking the conveyance of title to himself, the law implies a trust of the title for B. Or, where an agent employs the money of his principal, or a trustee the funds of the *cestui que trust*, in purchasing lands, taking a conveyance to himself, by construction of law a trust of the legal estate results to the principal, or to the *cestui que trust*. Whenever the trust is dependent upon the agreement or declaration of the parties—when it does not arise from facts proved, attending the creation of the legal estate, it can not rest in parol—the statute is positive, it must be created by writing, signed by the party declaring or creating the same.—Perry on Trusts, §§ 79–81; 2 Lead. Eq. Cases, 974–5; *Flint v. Sheldon*, 13 Mass. 448; *Graves v. Graves*, 29 N. H. 129; *Smith v. Halenback*, 51 Ill. 223, *Lautry v. Lautry*, *ib.* 458; *Philbrook v. Delano*, 29 Me. 410; *Gerry v. Stinson*, 60 *ib.* 186; *Barrett v. Dougherty*, 32 Penn. St. 371; *Miller v. Cotton*, 5 Ga. 341.

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The counsel for the appellant insist, that as the conveyance to Beecher is shown to have been without consideration, good or valuable, the law implies, or rather there is a resulting trust to the grantor, not affected by the express parol agreement for such trust. It was the doctrine of the ancient common law, that on all conveyances to a stranger, *not declaring uses*, made without consideration, the use which was no more than the trust of the present day, resulted to the grantor, if he was seized of the fee.—Coke Litt. 23a, 271a; 1 Com. Dig. 420. However this may have been as to common law conveyances, a deed of bargain and sale, or a covenant to stand seized, before and since the statute of uses, are regarded as declarations of uses.—1 Sanders on Uses & Trusts, 152-7. The statute of uses simply converts them from declarations, which a court of equity would establish and execute, into conveyances of the legal estate. Without transmutation of possession—without livery of seizin, by force of the statute, they operate as conclusive and effectual conveyances, as the feoffment or grant of the common law. *Horton v. Sledge*, 29 Ala. 478. There has never been in use in this State, any of the common law conveyances, which operated without consideration, and to the operation of which livery of seizin was essential. All our conveyances are in form bargains and sales, or covenants to stand seized, deriving their operation from the English statute of uses, a part of our common law, or from our own statute, the same in substance.—*Horton v. Sledge*, *supra*. These conveyances are founded on a consideration expressed on the face—a bargain and sale on a *valuable consideration*—a covenant to stand seized on a *good consideration*. The statute intervenes, and by its own force converts the use into a legal estate in the bargainee or covenantee. Parol evidence disproving the consideration expressed, changing the character of the conveyance, is inadmissible without violating the principle, that parol evidence can not control, alter, vary or contradict a writing, as between the parties, no part of a conveyance is more essential, or more solemn, than the expression of the consideration, which determines its character, either as a bargain and sale, or as a covenant to stand seized. The grantor is bound by it, as he is by any other recital or admission the deed may contain. The consideration may, as in the present conveyance, be pecuniary, and it may be permissible for either party to show a greater or less consideration of the same kind, than that expressed.—*Sanders v. Hendrix*, 5 Ala. 221. But in the absence of fraud or mistake, it is not permissible for them, by parol, to show a want of consideration, or a consideration of another kind.—*Murphy v.*

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Br. Bank, 16 Ala. 90; *Graves v. Graves*, 9 Foster (N. H.) 129; *Perry on Trusts*, § 162; *Hill on Trustees*, 61; 1 *Leading Eq. Cases*, 282.

The want of consideration would simply render the conveyance voluntary, inoperative against the existing creditors of the grantor, but as between the parties it would be valid, operative to pass the legal estate, excluding the implication of a use or trust for the grantor.—*Leman v. Whitely*, 4 Russell, 423; *Soursbye v. Arden*, 1 Johns. Ch. 240; *Wilkinson v. Wilkinson*, 2 Dev. Eq. 376; *Green v. Thomas*, 11 Me. 38; *Philbrook v. Delano*, 29 *ib.* 410; *Graves v. Graves*, 9 Foster (N. H.) 129; *Titcomb v. Morrill*, 10 Allen, 15; *Squire v. Hursler*, 1 Paige, 494. It is of itself a declaration of uses, and if not otherwise expressly limited, the statute would intervene, and it would pass a fee simple.—Code of 1876, § 2178.

It is also insisted, that if the trust is not an implied or resulting trust, but a direct, express trust, it is of the character a court of equity, for the prevention of fraud, is accustomed to withdraw from the operation of the statute of frauds. "In the construction of that statute," it is said by Judge Story, "a general principle has been adopted, that as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, when from fraud, imposition, or from mistake, a contract of this sort has not been reduced to writing; but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself under the statute." 1 Story's Eq. § 330. That fraud, imposition, or mistake, will in a court of equity, take a case without the statute, all the authorities agree; but in the application of the principle, as on many of the questions which arise on the construction and operation of the statute, there is great diversity of opinion.

There are authorities, (now invoked by the appellant,) which hold, that though no fraud or imposition is intended or practised, if a deed is executed, or a will made, or any contract required to be in writing is entered into, if it is attended by a parol agreement, that it shall operate only for particular uses and purposes, though the parol agreement is intentionally omitted from it, and its performance left entirely to the conscience of the party promising, a subsequent violation or repudiation of the agreement, is a fraud against which a court of equity will relieve, by withdrawing the case from the grasp of the statute. Other authorities, more numerous, hold that the fraud which will withdraw a case from the

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operation of the statute is not simply that fraud which may be imputed to every deliberate breach of a contract or promise. "The true rule," says Mr. Browne, "seems to be that there must have been an original misrepresentation by means of which the legal title was obtained; an original intention to circumvent, and get a better bargain, by the confidence reposed."—Browne Stat. Frauds, § 94; 2 Leading Eq. Cases, 963; *Hoge v. Hoge*, 1 Watts, 163; *Kisler v. Kisler*, 2 Watts, 225; *Jackman v. Ringland*, 4 W. & T. 149; *Johnston v. La Motte*, 1 Rich. Eq. 347; *McDonald v. May*, 6 *ib.* 91; *Miller v. Cotton*, 5 Geo. 341; *Glass v. Hulbert*, 102 Mass. 24.

It is insisted this court has recognized and adopted the rule first stated, and that though no fraud, no imposition, no violation of confidence was practiced or intended at the execution of the deed, its conversion to other uses than such as were expressed by the parol agreement, is a fraud against which courts of equity will relieve. If the rule has been established, it is a rule of property from which we are not at liberty to depart, and its reason or policy would not be open to discussion. The cases supposed to have established the rule are, *Kennedy v. Kennedy*, 2 Ala. 571; *Bishop v. Bishop*, 13 Ala. 475; *Barrell v. Hanrick*, 42 Ala. 60. After a careful examination of the cases, whatever may be the expressions found in them, we do not think they can be regarded as an adoption of the rule, or that it was necessary to sustain the results reached in either, unless it was the latter case. All of them, (except the latter,) originated and were decided before the enactment of the present statute against the creation of parol trusts, while the common law of force, which recognized and enforced such trusts, if the rule forbidding the introduction of parol evidence to vary written instruments was not offended.

In *Kennedy v. Kennedy*, *supra*, the grantor and grantee were brothers, who for many years had lived in the most intimate relations, conducted business, if not strictly partners, yet jointly, and in the grantee, the grantor had reposed most unlimited confidence, relying greatly on his advice and judgment. Having fallen into intemperate habits, unfitting him for the intelligent transaction of business, the grantor was induced by the grantee and other relatives, who wished to strip him of the power of making injudicious dispositions of his real estate, to make the absolute conveyance in question. The purpose of the conveyance was, that the grantee should hold in trust for the use and benefit of the children of the grantor, who were infants, and it was attended with the promise that he would so hold. The conveyance proceeded from the suggestion of the grantee—from the confidence re-

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posed in him, which he accepted, and upon which he induced the grantor to rely. The trust would have been valid at common law. Under the statute of frauds, the case belongs to that large class to be found in the books, in which a court of equity interferes to relieve against the fraudulent prevention of acts to be done for the benefit of third persons.—1 Story Eq. §§ 251, 781; Perry on Trusts, §§ 181-2; 2 Lead. Eq. Cases, 978. It is not the verbal promise, but the fraud of the donee, or devisee, which invites the interference of a court of equity. "It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of a legal title into a trustee, to get at him."—*Hoge v. Hoge*, 1 Watts, 214; *Glass v. Halbert*, 102 Mass. 39; *Miller v. Pearce*, 6 W. & T. 99. The case of *Barrell v. Hanrick*, *supra*, if it can be supported, must rest upon this ground.

In *Bishop v. Bishop*, *supra*, the trust was of personal property. In the absence of a statute, personal property may be sold and transferred, or trusts thereof created or extinguished by parol. Such trusts are not within the prohibition of our own, or of the English statute of frauds.—Perry on Trusts, §§ 84-86.

The case of *Barrell v. Hanrick*, *supra*, is the only case of a parol trust dependent wholly on the agreement of the parties, not arising by implication of law, originating since the enactment of the present statute. The learned judge delivering the opinion, adopts to its fullest extent, the proposition, that though there is no fraud, imposition, or mistake at the execution of the instrument, the subsequent violation of a parol promise inducing its execution is a fraud, which authorizes a court of equity to establish and enforce the promise in opposition to the statute. And it is said: "We are precluded from considering the question an open one, by the former decisions of this court." The decisions supposed to preclude us, are the cases of *Kennedy v. Kennedy*, *supra*; *Bishop v. Bishop*, *supra*, neither of which, as we have seen, involved the question; each originating and decided before the enactment of the statute, and the latter a trust of personal property, not within the statute, capable of creation, or of extinguishment by parol. It is not necessary now to say how far we would feel bound to follow *Barrell v. Hanrick*, in a case similar in its facts, or one in which a devisee, or donee, was active in intercepting the bounty intended for another, or in preventing the parol trust from being reduced to writing. We cannot regard it as establishing the proposition, so broadly asserted, that the mere repudiation or violation of a parol promise, or trust, offensive to the statute, is a

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fraud which will authorize a court of equity to relieve against the words of the statute.

The exception of cases from the operation of the statute of frauds, eminent judges have regretted, and have declared they would not carry them further than well defined decisions compelled. In *Lindsey v. Lynch*, 2 Sch. & Lef. 4, Lord Redesdale, said: "The statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas, it is manifest, that the decisions on this subject have opened a new door to fraud." The observations of Judge Story, are instructive and admonitory to a court called to fix the construction and operation of a statute recently enacted, for the prevention of frauds and perjuries, clear and unambiguous in its terms, prohibiting the creation of parol trusts, dependent for their existence wholly on the agreement of the parties. Of the exceptions, judicial decision has introduced, trenching upon the policy and objects of the statute, he says, "it is far from being certain, that they do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them in the promotion of good faith, and the furtherance of justice.—1 Story's Eq. § 765.

The plain meaning of the statute, is, that a trust in lands, not arising by implication or construction of law, cannot be created by parol—that a writing signed by the party creating or declaring the trust, is indispensable to its existence. Fraud, imposition, mistake, in the original transaction, may constitute the purchaser, or donee, a trustee *ex maleficio*. It is *fraud* then, and not *subsequent fraud*, if any exist, which justifies a court of equity in intervening for the relief of the party injured by it—as it is the payment of the purchase money at the time the title is acquired, which creates a resulting trust, and not a subsequent payment, whatever may be the circumstances attending it.—*Barnett v. Dougherty*, 32 Penn. 371. When the original transaction is free from the taint of fraud or imposition; when the written contract expresses all the parties intended it should; when the parol agreement which is sought to be enforced, is intentionally excluded from it; it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a

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basis for a similar imputation, whenever any promise or contract is broken.—*Wilson v. Watts*, 9 Md. 356-436. It is an annihilation of the statute, to withdraw a case from its operation, because of such violation or repudiation of an agreement or trust, it declares shall not be made or proved by parol. There can be no fraud, if the trust does not exist, and proof of its existence by parol, is that which the statute forbids. In any and every case, in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation. We are not inclined to establish a precedent in the early days of the construction of the statute, of which it can be justly said, that it trenches upon its policy and objects, creating an exception to its words, and opening a door for all the mischief it was intended to suppress. A mere parol promise by the grantee that he will hold for the use, and reconvey to the grantor on request, is a trust which must be created or declared by writing. If not so created or declared, in the absence of some clear evidence of fraud, imposition, or mistake, at the time of the execution of the conveyance, his repudiation of it is not a fraud, against which a court of equity can relieve.—2 Lead. Cases Eq. 974-8.

It is difficult to conceive of any good motive a grantor can have in the execution of an absolute conveyance, intending that the grantee shall be the mere repository of a naked legal title, while he reserves the exclusive beneficial interest. Such a reservation, or trust, if written on the face of the conveyance, or declared by writing executed at the same time, would nullify the conveyance, depriving it of all operation, and the legal estate would remain in the grantor.—Code of 1876, § 2185. If the trust was declared, and some active duties were required of the trustee, there would not rest on the transaction any just suspicion. But when, as in the present case, no such duties are required, when he is simply clothed with the naked legal title, and the entire control and exclusive enjoyment is reserved by the grantor, it is difficult to resist the strong expression employed elsewhere, that he is "guilty of a gross folly, or actuated by a sinister design." If moved by the latter, he cannot ask a court of justice to relieve him from the toils of his own invention; if the former, he must show that he has been over-reached; that his folly has been practised upon by the more wary, or he cannot ask reasonably that rules of law shall be suspended for his benefit.

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Without departing from the statute, in equity, an absolute conveyance, taken merely as a security for a debt, may, on parol evidence, be converted into a mortgage. The court does not profess to give effect to a parol agreement for a reconveyance, or a parol trust that the grantee should hold for the use of the grantor. The relation of debtor and creditor affords the latter so many opportunities of taking advantage of the necessities of the former, that transactions between them are narrowly watched. A conveyance taken and accepted as mere security for a debt, whatever may be its form, is a mortgage. Once a mortgage, always a mortgage, is the maxim, and however broad is the power of contracting, or of disposing, restraints upon the equity of redemption, though deliberately imposed, are not tolerated. The principle cannot be violated by putting the conveyance in the form of an absolute deed. If the creditor accepts the deed on no other consideration, and for no other purpose than as a security for a debt, a case of fraud and trust is made out, which requires the interference of the court to give effect to the equity of redemption if it is denied. This class of cases has always been distinguished from a mere oral agreement by the grantee, that he will hold for the use of the grantor.—2 Lead. Eq. Cases, 964.

It is a very general rule, that to enable a party to show a secret trust in the face of an absolute conveyance, it must appear the purpose was an honest one, or else by secret fraudulent device, a dishonest man would be sure never to lose, and he has the chance of gaining. He may accomplish his fraudulent design, and then he is sure to get back his property, or what is the same thing, keep it for his family. This would be affording encouragement to such frauds.” *Murphy v. Hubert*, 16 Penn. St. 50.

The bill avers, and the averment is supported by the evidence of the appellant and of her husband, that the conveyance to Beecher was executed because of the husband's insolvency, and in apprehension that his creditors would, if the title remained in appellant, seek to subject the property to his debts. No conveyance, no contract, no trust, designed to defraud creditors will be enforced by courts of justice. This proposition is conceded by the counsel of appellant, but they insist that the property was not liable for the debts of the husband. The deed was harmless, therefore, and the motive to defeat rights having no existence, and to defraud or delay creditors who could not be injured, cannot render it illegal.—*Dearman v. Dearman*, 4 Ala. 521; *Wilson v. Shepard*, 28 Ala. 623; *Paulk v. Gillespie*, 34 Ala. 541. A conveyance, or a transfer of property, or of rights of property, not

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liable to the payment of debts, cannot be said to defraud creditors, whatever may be the intention of the parties. Upon this principle, the English courts of equity have proceeded in supporting voluntary conveyances of property not liable to be taken on execution for debts.—1 Story's Eq. § 367. But when parties avow that the motive of a conveyance was to screen property from the vigilance of creditors, and to prevent them from resorting to legal remedies to subject it to the payment of debts, they must expect their conduct to be closely and jealously scrutinized. If they would relieve themselves from the imputation of fraud, while confessing that they designed it upon the ground that the property was not liable to the debts from which they intended to shelter it, they must be prepared to show clearly the absence of the liability.

The testimony shows that Beecher paid certainly one-half of the original purchase-money of the premises, and contributed the greater part, probably nine-tenths, of the cost of the improvements. The payment of the purchase-money and of the cost of the improvements, Beecher was to be reimbursed (and was reimbursed to a large extent) according to the evidence of appellant and her husband, by board and lodging, care and attention given him by the appellant. If this be true, to the extent Beecher was so reimbursed, the husband had an interest in the premises which his creditors could have subjected to his debts. It may be, that the appellant devoted her time and attention to the management of the household affairs, and bestowed on Beecher care and nursing in his sickness, and that her energy and industry contributed largely, or entirely, to the maintenance of the family. The earnings and savings of the wife belong to the husband, and he can make no gift of them to her, affecting the rights of existing creditors. A gift of such earnings or savings, is subject to the same rules which apply to other conveyances.—*Pinkston v. McLemore*, 31 Ala. 308; *Shaeffer v. Sheppard*, 54 Ala. 244; *Carleton v. Rivers*, *ib.* 467. If he should invest, or suffer them invested in improving the real estate of the wife, or in paying the purchase-money of real estate, title to which stands in her name, a court of equity will subject such real estate, at the instance of his creditors, to a liability for such earnings or savings.—*Hoot v. Sorrell*, 11 Ala. 386. When all the facts of this case are carefully examined, the conclusion is irresistible, that the conveyance to Beecher was intended to withdraw the property from the vigilance of the creditors of the husband, covering it from any effort they could make to subject it to their demands, or that Beecher, having paid the purchase-money, and made

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the improvements, preferred the title should stand in his own name. He may have intended, at some future time, to give the property to the appellant, as he certainly intended that it should, during his life, be a home for her and her family, as well as himself. The intention was not consummated, and the assignment to Chambers disables him from consummating it. In no aspect of the case can the parol trust set up by the appellant be supported.

Let the decree be affirmed.

Chambers v. Stringer.

Proceeding to compel Delivery of Property of Office to Successor.

1. *Code of 1876; § 206 et seq; who subject to remedy, prescribed by.*—A county treasurer, refusing or failing on demand to surrender to his successor the property and books of the office is subject to the remedy provided by sections 206-212 of the Code of 1876; and such remedy is not to be embarrassed by questions of mere pleading, or by inquiry into the regularity of the proceedings by which one party may have been removed, or the other inducted into office.

2. *Same; who entitled to remedy provided by.*—The only inquiry in a proceeding under these sections is, has the party complaining a clear *prima facie* right to the office, and has the party complained against, possession of the property, neglecting and refusing, after demand made, to surrender it; and for all the purposes of such proceeding, a commission from the Governor founded either on a certificate of election or a vacancy, is a sufficient title to require the order of delivery to be made.

3. *Trial by jury; in what case not allowed*—Under these sections of the Code, the judge of the Circuit Court is the sole trier of the facts, and is without authority to empanel a jury; the constitutional guaranty of trial by jury not extending to cases of this character.

APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

This was a proceeding under the statute, commenced by the appellee, Phillip G. Stringer, as treasurer of Talladega county, to compel the appellant, George W. Chambers, his predecessor in office, to deliver to him the books and papers belonging to such office. The complaint alleged that the appellee was the county treasurer, having been duly appointed and qualified, and that he was entitled to the possession of all the books, papers, and property belonging to such office. The petitioner further averred that certain books and property belonging to the office were in the possession of the appellant, who was the immediate predecessor of appellee in the office, and that subsequent to his appointment and qualification he

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had demanded possession of such property, which had been refused. Upon the filing of this petition, the Circuit Judge, Hon. John Henderson, made an order requiring the appellant to show cause before him on a certain day, why he should not be compelled to deliver up the books and property of the office. On the day appointed the appellant appeared and pleaded: 1. "That the Circuit Judge had no power to hear and determine this cause, until the right of the plaintiff, Phillip G. Stringer, to the office of county treasurer of Talladega county shall have been judicially ascertained in the mode provided by law, and defendant avers that no such judicial ascertainment has ever been made." 2. That "the defendant was duly elected county treasurer of Talladega county in November, 1874, and that he gave bond and qualified as such according to law, and entered upon the discharge of his duties, and has continued in the discharge thereof from some time in November, 1874, until the present; and this defendant avers that there is no vacancy in the office, nor was there any on the 17th day of May, 1876, on which day the Probate Judge certified to the governor that there was a vacancy in such office," &c. The plea then avers the making of an order, by the court of county commissioners, on the 10th day of April, 1876, fixing the amount of the treasurer's bond at twenty thousand dollars, and that in obedience to such order, the defendant, on the 10th day of April, 1876, presented to the Judge of Probate a bond for that amount, which that officer declined to approve or disapprove, or to take any action whatever upon it. 3. "That Phillip G. Stringer has not been appointed county treasurer of Talladega county." A demurrer to the first of these pleas was sustained, and issue joined on the other two. Thereupon the defendant demanded a jury to try the issue, which the judge refused to allow, and proceeded to hear said petition, and the defendant excepted. The appellee then offered in evidence a commission appointing him treasurer for the county of Talladega, dated May 30th, 1876, and signed "Geo. S. Houston, Governor." This evidence was objected to on the ground: 1. That it was on its face illegal. 2. That there was no evidence of a vacancy in the office of county treasurer. 3. Because it does not show that Phillip G. Stringer has been appointed county treasurer of Talladega county. The judge overruled these objections, and the defendant excepted.

The appellee then offered in evidence the certificate of the Probate Judge that a vacancy existed in the office of county treasurer, and an official bond given by appellee and properly approved, and his oath of office. This evidence was objected to, on the ground that it was illegal and irrelevant; but the

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court overruled the objections, and the defendant excepted. The plaintiff then proved that he had, in writing, demanded of the defendant possession of the books and property of the office, which the defendant had declined to deliver to him. The defendant introduced evidence bearing on the legality of the action of the Probate Judge, which, in the view of the case taken by this court, need not be further noticed. The Circuit Judge made an order that the defendant deliver possession of the property to the plaintiff, from which order this appeal is prosecuted.

GEORGE W. PARSONS, for appellant.

JOHN T. HEFLIN, *contra*.

BRICKELL, C. J.—The proceeding was instituted by the appellee as county treasurer of Talladega county, to compel appellant, his predecessor in his office, to deliver the books, papers, property and money pertaining to the office, and is founded on the statute.—Code of 1876, § 206-12. There can be no doubt that a county treasurer refusing or neglecting on demand to surrender to his successor, the books, property, papers and money of the office is within the purview of the statute, and subject to the remedy it prescribes. It is equally manifest that it is not contemplated the statutory remedy shall be embarrassed by questions of mere pleading, or by collateral inquiries into the propriety or regularity of the proceedings by which the one party may have been displaced from, and the other inducted into office. The whole inquiry is, has the party complaining a clear *prima facie* title to the office, and a consequent right to the custody of the property of the office, and has the party complained against, possession of the property, neglecting and refusing, after demand made, to surrender it.

For all the purposes of this proceeding, a commission from the governor, founded on a certificate of election, or a certificate from the proper authority disclosing a vacancy, is an unassailable title, on which the court must act, and compel the delivery of the property of the office. There can be no further or other inquiry into the title to the office. The proceeding is not designed to test the strength of rival or opposing titles to the office. The law provides other and more efficient remedies for that purpose.—*Thompson v. Holt*, 52 Ala. 491; *Plowman v. Thornton*, *ib.* 559.

The judge is the sole trier of the facts under the statute, and is without authority to empanel a jury. The constitutional guaranty that the trial by jury shall remain inviolate,

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does not extend to cases of this character.—*Boring v. Williams*, 17 Ala. 510:

The Circuit Judge seems to have conformed his action to the statute, and his judgment is affirmed.

Myers v. The State.

Indictment for Murder.

1. *Evidence; what admissible.*—The credibility of evidence is a pure question for the jury. When testimony tends to elucidate a material issue in the case, no matter how little light it may shed on the controverted question, it must be received, and its weight and credibility left to the jury.

2. *Self-defense; what is.*—Where it is shown that the accused and the deceased had quarreled on the day previous to the killing, and that when they met on the day of the killing, the accused commenced the fatal quarrel and made the first hostile demonstration, and advanced on the deceased in a threatening manner, the deceased could strike in anticipation, provided he did not employ unreasonable force in repelling such assault, and such blow would be self-defense, although the first stricken.

3. *Killing; what will not justify or excuse.*—When the accused is the aggressor, and is threatening the deceased with present danger, a blow struck by the deceased, although first struck, if not greatly disproportionate to the peril, will neither excuse nor mitigate the killing; and, in such a case, the previous state of feeling between the parties, or the fact that the deceased had made threats, should exert no influence on the decision of the case, unless there was some present impending purpose, real or apparent, to carry out such threats.

4. *Evidence; what should be admitted.*—When there is an absence of proof as to the attitude of the parties at the outset of a fatal rencontre, evidence of statements by the deceased of his purpose in visiting the place at which the difficulty took place, should be received, to show the state of feeling between the parties.

5. *Same; what admissible.*—Threats made by the accused prior to the killing are admissible against him on a trial for the killing.

6. *Charge; what proper.*—When there is evidence of previous difficulties between the slain and the accused, and of a fight in which one is slain, a charge by the court, "that murder in the first degree is when a homicide is committed with a specific intention to take life, deliberately formed and acted upon, or where a killing results from a reckless disregard of human life; but if neither of the above ingredients is shown by the testimony, and the proof shows the killing was done with malice, it is murder in the second degree. If, however, it is shown by the testimony that the killing was not done with a specific intention, nor from a reckless disregard of human life, nor with malice, yet voluntarily done, it is manslaughter in the first degree; and if a killing is done under circumstances which do not make it murder in the first or second degree, or manslaughter in the first degree, and yet is done without legal provocation, and not in self-defense, it is manslaughter in the second degree,"—correctly states the law of homicide, and is properly given.

APPEAL from Russell Circuit Court.

Tried before Hon. W. B. Wood.

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The appellant, 'Squire Myers, was indicted for the murder of one George Boykin. On the trial, it was shown that on the day before the killing, the accused and the deceased, in company with others, were at the boat landing at Bluffton, on the Georgia side of the Chattahoochee river; that deceased told accused that he could not ride in his boat unless he paid him a nickel which he already owed him; that defendant told deceased that he would not pay him the nickel, and would kill him on any part of the ground he could find him. On the morning of the homicide, deceased, defendant, and several others met at the house of one Dick Patterson, who testified that on his return from a walk over his crop, he built up a large fire, around which all the persons present gathered; that he went out to fix the well bucket, and afterwards engaged in conversation, outside the door, with the deceased, George Boykin; that, while so engaged, the defendant, who had been lying down in another room, came out and spoke with deceased, and then asked him "why it was those locks had not been delivered up," to which deceased replied "that those locks were all right, and he could get them." Defendant then said "it was damned strange the locks had not been delivered up," and he demanded that it should be done without further delay. Deceased said: "Squire, you need not talk so smart about it; the locks are down at my house, and you can get them right now if you go after them." Defendant then said, "you ought to have delivered them long ago," and that he did not like the way deceased treated him the day before, down at the river, about that boat; to which deceased replied: "You threatened my life down there yesterday, and I'll let you know that if I had been over there when you threatened me yesterday, you or me one would have had to go to hell, right there." Defendant then said: "You shall have a trial of it now," and got up from where he was sitting. Patterson then spoke up, and told them that they "must stop and not have any fuss here." This witness further testified that he heard several licks behind him, and, on looking around, he saw defendant cut deceased, just over the right ear, with a pocket knife, and saw deceased stagger and fall; that witness then ran in the house and got his shot-gun, and ran back with it, when he saw defendant coming with an ax, and ordered him to stop, which he did; that soon after this, one Robbins came up and pulled the knife out of the head of deceased; that the wounded man was then carried into witness' house, where he died five days afterwards.

Asberry Walton testified that one night, some three or four weeks before the killing, he was going along the road behind

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defendant, and heard him cursing deceased, and saying he was a damned rascal; that he had defendant's locks, and would not give them up. The defendant moved the court to exclude the testimony of this witness, but the court refused to do so, and defendant excepted.

Several witnesses for the State testified, as to what took place at the river on the day before the killing, substantially as the witness Dick Patterson had done. It was also shown that, shortly after the difficulty which resulted in the death of deceased, his stick (which was a hickory one) was found near where he had fallen. It was admitted that if one Edney Walton, a witness for the defendant, was present, she would testify as follows: "That she resided in the house of defendant's mother, on the plantation of Mr. M. L. Patterson; that on the Sunday morning on which the killing took place, deceased came by the house with a hickory stick in his hand, about an inch in diameter, and asked if Squire Myers was there. Witness told him no, to which he replied: 'Well, I am hunting him; that is my business up here to-day. I have got to kill him or he kill me.' Defendant then asked witness if Squire was up to Dick Patterson's house, to which she replied that she thought he was; and, thereupon, deceased went off directly in the direction of Dick Patterson's house, which was distant about half a mile." The solicitor objected to the introduction of this evidence, on the ground that it had not been proven that the threats mentioned were ever communicated to the prisoner before the killing. The court sustained the objection, and excluded the testimony, and defendant excepted.

The court then charged the jury as follows: "Murder in the first degree is where a homicide is committed with a specific intention to take life, deliberately formed and acted upon, or where a killing results from the reckless depravity of the heart, evidencing a reckless disregard of human life. But if neither of the above ingredients is shown by the testimony, and the proof shows the killing was done with malice, it is murder in the second degree. If, however, it is shown by the testimony that the killing was not done with a specific intention, nor from a reckless disregard of human life, nor with malice, yet voluntarily done, it is manslaughter in the first degree. But if you find from the evidence that the defendant is not guilty of murder in the first or second degree, nor of manslaughter in the first degree, then if the testimony shows that he killed him without legal provocation, and not in self-defense, it would be manslaughter in the second degree. 1. If the jury believe, from the evidence, that the defendant, in Russell county, before the finding of the

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indictment, killed George Boykin wilfully, deliberately, maliciously, and premeditatedly, he is guilty of murder in the first degree, and you will so find. 2. Or if you believe, from the evidence, that the defendant killed George Boykin from a reckless depravity of the heart, evidencing a reckless disregard of human life, it is murder in the first degree, and you will so find. 3. But if you believe that it was not done with a specific intention to take life, deliberately formed and acted upon, nor from a reckless disregard of human life, but that he killed him with malice aforethought, then he is guilty of murder in the *second degree*, and you will so find. 4. If, however, you believe, from the testimony, that the offense of murder in neither the first nor second degree is established, then if you believe, from the testimony, that defendant killed George Boykin voluntarily, without malice, and without a necessity therefor, it is manslaughter in the first degree, and you will so find. 5. But if you believe the evidence does not establish murder, nor manslaughter in the first degree, then if the testimony shows that defendant killed Boykin without a necessity to save his own life, or prevent great bodily harm, then it is manslaughter in the second degree, and you will so find. But if you find that defendant did kill Boykin, but that it was done under circumstances which induce a reasonable belief that deceased intended to take defendant's life, or to do him some great bodily harm, and the purpose to execute the design was accompanied by some attempt to execute it, or the deceased, at least, was in an apparent situation to do so, and so induced a reasonable belief that he intended to do so immediately, then it would be self-defense, and he is not guilty. If, however, the defendant brought on the combat, he can not avail himself of the plea of self-defense. When life is taken by the direct use of a deadly weapon, the law presumes malice, from the use of a deadly weapon, and casts on the defendant the burden of proof of repelling the presumption, unless the evidence which proves the killing shows also that it was done without malice."

There were various charges given and refused by the court below, which, in the view this court takes of the case, it is not necessary to notice further. The defendant was found guilty of murder in the first degree, and sentenced to be hanged. From this judgment and sentence he appeals to this court.

ULYSSES LEWIS, for appellant.

HENRY C. TOMPKINS, Attorney-General, *contra*.

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STONE, J.—The credibility of evidence, legal and pertinent to the issue, is clearly a question for the jury. True, the court may and should lay down rules for weighing testimony in proper cases. It can go no farther. When testimony tends to elucidate any material matter of contestation in the trial, is not too remote, and is not introduced for the purpose of supplying an analogy in argument, it must be received, and its weight considered by the jury. Neither the Circuit Court nor this court can pronounce such testimony worthless or unavailing. The evidence in the present record tends to show the prisoner and the deceased had quarreled the day before, and threats were made. When they met the following morning, if the statement of the first witness for the State be correct, the prisoner made the first offensive remarks which brought on the rencontre, made the first overture to fight then and there, and, by his movements, made the first hostile demonstration. If this be so, and if the accused advanced on the deceased in a threatening manner, the deceased could strike in anticipation, provided he did not employ unreasonable force in repelling the impending assault; and such blow would be self-defense, although the first stricken. If the positive testimony, or circumstances, show with the requisite certainty that defendant was advancing on deceased, or menacing him with present danger, having, in either event, a drawn knife or other deadly weapon; or, being in the act of drawing such deadly weapon, then, a blow by the deceased, although the first struck, to save himself from such impending peril, would not constitute him the aggressor, but would stand justified under the law of self-defense. And if these be the facts, then such first blow struck by the deceased, if not greatly disproportioned to the peril, would neither excuse nor mitigate the fatal wound inflicted by the prisoner. A man may not bring on or provoke a difficulty, and then justify the use of deadly weapons, under the plea of self-defense.—*Lewis v. The State*, 51 Ala. 1; *Eiland v. The State*, 52 Ala. 322; *Clarke's Manual Cr. Law*, sections 377-8. On this theory of the case, the previous state of feeling between the parties, and any threats that may have been made prior to that time by the slain, should exert no influence on the jury, unless there was a present impending purpose on his part, real or apparent, to put such threats into immediate execution.—*Clarke's Manual*, sections 384-6, 392.

There is an absence of proof in the present record of the exact attitude of the parties at the onset of the rencontre. Whether the accused was advancing with a weapon drawn, or in the act of being drawn, what was the attitude of the deceased at that time, these are questions upon which there

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is no positive proof. The purpose of the deceased in visiting the place where the homicide was committed, may shed some light on this question. But, as we have said, his purpose and any uncommunicated threats he may have made, should weigh nothing with the jury, if the deceased did not first make some demonstration of an intention to carry them into present effect. Under the circumstances of this case, and with the cautionary limitations expressed above, the testimony which it was admitted Edney Walton would give, if present, should have been allowed to go to the jury, as tending to show the state of feeling entertained by the deceased towards the accused, and the purpose he had in going that morning to the house of Dick. Patterson. If, however, his only purpose was to resist an assault, should it be made upon him, and he made no visible demonstration of a present intention of carrying the threat into execution, this would neither excuse nor mitigate the conduct of the accused. *Hughey v. The State*, 47 Ala. 97; Clarke's Manual, sections 396-8; *Copeland v. The State*, 7 Humph. 479; *The State v. Sloan*, 47 Mo. 604; *Pridgen v. The State*, 31 Tex. 420; *People v. Scoggins*, 37 Cal. 676.

In the late cases of *Mitchell v. The State*, 58 Ala. 417, and *Ex parte Nettles*, 58 Ala. 268, we discussed the doctrine of murder under our statutes so fully, that we consider it unnecessary to comment on the charge of the court in this case. It fairly presents the true doctrine of murder, as raised by the testimony, and that was enough for the present case. Charges asked and refused will scarcely arise again in their present form, and we will not consider them. The Circuit Court did not err in receiving evidence of threats previously made by the accused.—*Evans v. The State*, ante, p. 6.

Reversed and remanded. The prisoner will remain in custody until discharged by due course of law.

INDEX.

ACCOUNT.

1. *Single account; what constitutes.*—Where an indebtedness is contracted with a merchant, most of the articles furnished being purchased by the husband, and the account runs through several years, some of the items being such as the statutory estate of the wife is liable for; others for expenses incurred in cultivating the lands composing the separate estate of the wife; others for the expenses of a partnership plantation carried on by the husband and a third person, and still others for the personal expenses of the husband; and this account is kept as one continuous running account on the books of the merchant, such account constitutes but one debt, for the whole of which the husband is liable; and but one suit can be maintained against him for its recovery.—*Lee v. Tannenbaum*, 501.

See HUSBAND AND WIFE.

ACKNOWLEDGMENT. See CONVEYANCE.

ACTION.

1. *Ejectment; what necessary to maintain.*—A purchaser of lands at a sheriff's sale, cannot maintain ejectment, unless he shows a valid judgment supporting the execution; and no such judgment can operate as authority to sell, unless it proceeds from a court having competent jurisdiction, not only as to the subject matter, but also of the person whose estate it is the purpose of the sale to divest.—*Carly v. Blue*, 77.
2. *Same; what necessary to recovery in.*—Ejectment was originally, at common law, a personal action of trespass, and while retaining that form, would have been properly classified as an action *ex delicto*; but in this State it has always been a mixed action for the recovery of land, and damages for its use and occupation, whether the right is simply possessory, or a right to the freehold itself; and whether the common law action of ejectment or the statutory real action is pursued, the issues are the same, the plaintiff must recover on the strength of his own title, and show that he had at the commencement of the suit a legal title entitling him to immediate possession, and that defendant was then in possession.—*Betz v. Mullen*, 365.
3. *Wife; when should be sued alone.*—Ejectment to recover lands in the possession of husband and wife, under a deed creating a statutory separate estate in the wife, must, under the provisions of the Code, (§ 2892) be brought against the wife alone.—*Ib.*
4. *Same; test of liability to suit alone.*—The test of the wife's liability to suit alone, is not the validity, but the nature and character of her title; if that devolves on her a statutory estate, as between her and her husband, she must be sued alone, though her title may be invalid or subordinate to the title of the plaintiff, and incapable of protecting the possession against his right of entry.—*Ib.*
5. *Action; who may maintain.*—A party in possession of lands, whatever may be his title, or though he be without title, can maintain an action for an injury to his possession against a wrong-doer.—*Eagle & Phoenix Co. v. Gibson*, 369.

ACTION—Continued.

6. *Trover; when maintainable.*—C, who had a mule, executed to H, a written instrument acknowledging the receipt from H of a given sum of money in full payment for the mule, and providing that if C paid said sum of money and costs to H by a given date, then the mule was to belong to C; otherwise the instrument was to remain in full force and effect. H permitted C to remain in possession. *Held*:
7. The effect of the instrument was to pass title to H, subject to be divested on payment of the specified sum, and until then, H was entitled to possession.—*Scott v. Hodges*, 337.
8. Whatever might be the right of a *bona fide* purchaser, one who occupied the relation to C of a voluntary donee, could acquire no greater right than he had, and could not set up want of notice; and the claim of title by such voluntary donee, and his assumption and use of the mule, were illegal and a conversion, for which trover lies.—*Ib.*
9. *Demand; when not necessary.*—Where possession originated tortiously, and was adverse to the true owner, demand is not necessary to maintain trover.—*Ib.*
10. *Tenants in common; when may maintain trover against another tenant; set-off to such action, when maintainable.*—If one tenant in common of a chattel converts it wholly to his own use, by a sale, his companion may maintain trover against him; and one tenant by agreement, express or implied, with the other, may be entitled to contribution for services rendered or expenditures made; and the share which the other tenant ought to contribute, would be recoverable in *assumpsit*, and would be matter of set-off in an action *ex contractu*, but not in defense of trover, which is in *tort*.—*Russell v. Russell*, 48.
11. *Trespass quare clausum fregit; what possession will support.*—In trespass *quare clausum fregit*, though the title may be, and is often drawn in question, the gist of the action is injury to the plaintiff's possession, and he is not bound to show title; possession will support the action against a stranger or wrong-doer.—*Lankford v. Green*, 314.
12. *Action for money had and received; when maintainable.*—Privity of contract is not necessary to support an action for money had and received; the law implies the promise to pay, whenever the defendant has money in his hands, the property of the plaintiff, and which the defendant has no legal right to retain.—*Harper v. Claxton*, 46.
13. *Same.*—In such a case, even if there be an express promise to pay, a breach entitles the plaintiff to recover only a sum certain, or capable of being rendered certain, and a common count is as appropriate for a recovery as a count stating the promise and its breach, unless the promise was conditional and dependent.—*Ib.*
14. *Same.*—Money paid on a contract which is rescinded, is recoverable in a count for money had and received; and though there may be no purpose or intention on the part of him who rescinds the contract to pay it, yet if by his conduct and acts he induces the other party to believe he will pay, he is bound to the same extent that he would be if he had, in express words, promised payment.—*Ib.*

ADVANCES.

1. *Mortgage of crop not planted; effect of subsequent delivery under.*—Although a mortgage purporting to convey crops not planted may be a mere executory contract, yet if the mortgagor, after the crops have been grown, delivers them to the mortgagee in execution of contract, he is thereby clothed with the legal title as fully as if the crops were in existence at the execution of the mortgage, and the title thus acquired will prevail over that of a subsequent mortgage.—*Stern & Simpson v. Johnson*, 194.
2. *Lien for advances; statutes conferring, construed.*—Although the lien for advances has priority over all liens, except that of the landlord for rent, when created and enforced according to the statute, yet such lien creates no right of property or possession in the party enforcing it by attachment, and the party raising the crop may transfer it freely, but such transfer is subordinate to the lien.—*Ib.*

ADVANCES—*Continued.*

3. *Same.*—Such lien is a mere charge, or incumbrance, and the claimant of it can not support trespass, trover, or detinue. The statute prescribes the remedy for its enforcement, by attachment to be levied on the crop, and such remedy is conclusive.—*Ib.*

ADVERSE POSSESSION. See LIMITATION, STATUTE OF.

AGENT AND AGENCY. See PRINCIPAL AND AGENT—DAMAGES, 3, 4.

ASSIGNMENT.

1. *Assignment; what valid.*—The generality of description of property intended to be conveyed by the assignment for the benefit of creditors, does not affect its validity, when, by parol evidence, a definite application of the terms may be had.—*Clark & Coleman v. Few*, 243.
2. *Judgment; assignment of; what sufficient.*—The assignment of a judgment may be by writing or parol, and when made in either manner, and founded on a sufficient consideration, passes the same right and confers the same authority; and no entry of it on the records of the court is required.—*Steele et al. v. Thompson*, 323.

ATTACHMENT.

1. *Attachment; when cannot be maintained.*—If a vendor who contracts to deliver cotton at a future day, certain, receives payment of the price, and before the day appointed disables himself from complying with his contract, the purchaser may treat the contract as rescinded, and sue presently for the money paid out; and an attachment on such a debt would not be premature, though commenced before the time fixed for the delivery of the cotton; but where there is no proof of a breach of the contract, other than the failure to deliver on the appointed day, an attachment sued out before that time is prematurely brought, and cannot be maintained.—*Russell v. Gregory*, 454.

See HUSBAND AND WIFE, 8, 9, 10; DAMAGES, 3, 4.

ATTORNEY'S FEE. See DAMAGES, 3.

AUDITOR.

1. *Code of 1876, § 596, construed.*—It is the fact of default by a public official, and not its ascertainment by suit, which makes it the duty of the Auditor (Code of 1876, § 596,) to withhold a warrant from such public defaulter for moneys due him by the State; and such default sufficiently appears, if shown by the records and books in the Auditor's office. *State ex rel. v. Brewer*, 215.
2. *Same.*—The fact that the default out of which this indebtedness to the State arose, occurred in the discharge of the duties of another and distinct office from that in which the defaulter earned the amount claimed from the State, does not affect the right and duty of the Auditor to withhold the warrant.—*Ib.*
3. *Same; conclusiveness of Auditor's action under.*—The withholding by the Auditor of a warrant for money due by the State to an officer, on the ground that he is a public defaulter to an amount exceeding the amount claimed, is not conclusive of the fact or amount of the default, and amounts to no more than the refusal of an individual to answer a demand against him, because he has a set-off.—*Ib.*
4. *Refusal of Auditor to draw warrant; what proper remedy for.*—If the Auditor refuses to draw his warrant for just claims against the State, for the payment of which provision is made by law, *mandamus* is the remedy; and when the refusal is put on the ground that the applicant is a public defaulter to an amount exceeding the amount claimed, the answer may be controverted, and the default established or disproved; but when the answer sets up such default and the relator demurs, *mandamus* must be denied.—*Ib.*

BAILMENT.

1. *Deposit; contract of, how construed.*—The contract made by the deposit of money, like any other, must be interpreted in the light of the circumstances surrounding the parties, and their relations to each other, at the time it is entered into; these often furnish the most satisfactory solution of the contract, when its character is uncertain or its terms inapt.—*Wright v. Paine*, 340.
2. *Special deposit; what is.*—In the absence of any evidence of the character of the business, in which the depositary was engaged, or other extrinsic facts aiding in the construction of the writing, an instrument signed by the depositary, by which he acknowledges that a third person has deposited with him for "safe keeping" a certain number of dollars in gold coin, which the depositary is to "return whenever called for," will be held to be a special, not a general deposit.—*Id.*
3. *Demand; when must be made.*—Where a demand is essential, as a condition precedent to an action, it must be made in a reasonable time; the party bound to make it can not postpone it indefinitely, and thereby keep alive claims which would otherwise become dormant and stale; and what is a reasonable time within which to make demand, depends very greatly on the circumstances of the particular case.—*Id.*
4. *Delay; what is unreasonable.*—Where a special deposit of coin was made for safe keeping, and more than seventeen years elapsed, the death of the depositary intervening more than two years before suit was brought, and eleven years elapsed after the deposit before demand was made for its return, the delay, in the absence of all explanation, was unreasonable.—*Id.*

BASTARDY.

1. *Bastardy proceedings; who may compromise.*—The mother of a bastard, after she has commenced proceedings against the putative father, may compromise the case and dismiss the prosecution, and a *bona fide* compromise is a bar to the further maintenance of the prosecution.—*Martin v. The State*, 119.
2. *Same; compromise of, presumption as to.*—The compromise of a bastardy prosecution is not an admission by the defendant of his guilt; and the jury should, on request, be instructed that they were not authorized to infer the guilt of defendant, because he entered into a compromise.—*Id.*

BILLS OF EXCEPTION.

1. *Bill of exception; when and where may be signed.*—Under the practice in this State, with the sanction of this court, prior to the act of 1844, it was common to sign and seal bills of exceptions, when exception was duly taken on the trial, either during or after the term, and often in another county than that in which the court was held. The statute of 1844, and subsequent amendments (Code, § 3133), changed this practice in one respect only—as to the time in which bills may be signed. *Ex parte Nelson & Kelly*, 376.
2. *Same; who must sign.*—The judge who presides on the trial is alone authorized to sign and seal a bill of exceptions in the cause; and where the judge of one circuit opens court in another circuit and tries causes during part of the term, he may, after ceasing to hold the court, sign and seal bills of exceptions in such causes, in a county and circuit other than that in which the court was held, if he does so during the term, though the judge of the circuit is then presiding in that court and continues to do so for the remainder of the term.—*Id.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Commercial paper; effect of transfer of.*—The transfer of negotiable paper, passing the legal title, made in good faith, and before maturity, founded on a valuable consideration, and without notice, creates in the transferee an original and paramount right of action against the makers, cutting off all legal and equitable defenses to which it may have been

BILLS OF EXCHANGE AND PROMISSORY NOTES—Continued.

- subject while it remained the property of the person to whom it was first delivered, and its negotiability is not affected, because it is payable to the order of the makers, and by them endorsed in blank.—*Mayberry & Co. v. Morris*, 113.
2. *Same; what sufficient consideration for transfer of*—The transfer of a negotiable paper, in payment of a pre-existing debt, is according to the known and usual course of business, and is founded on a valuable consideration, entitling the transferee to protection against equities and defenses to which the paper may have been subject between the original parties.—*Id*
 3. *Garnishment; when title of transferee of negotiable paper sought to be subjected, superior to lien of*.—Where the debt sought to be garnished is evidenced by negotiable paper, payable to the order of the makers, and by them endorsed in blank, which, at the time of the service of the garnishment, is in the hands of the judgment debtor, a transfer of such paper by the judgment debtor after the service of the writ to a third party, if made upon a valuable consideration, and without notice, before the maturity of the paper, clothes the transferee with a title superior to any right of the plaintiffs acquired by the issuance of the writ; the doctrine of *lis pendens* has no application to such a case.—*Id*.
 4. *Indorser; what necessary to bind*.—Where the holder and indorser of a bill of exchange both live in the same city, where the bill is payable, the indorser is entitled to personal notice of dishonor, and will not be bound unless such personal notice was given, or a sufficient excuse shown for not giving it.—*John v. City National Bank*, 529.
 5. *Same; what excuses not giving personal notice*.—It is a sufficient excuse for not giving an indorser personal notice of the dishonor of a bill of exchange, that the notary, on the day of the dishonor of the paper, called at the indorser's place of business, during business hours, to give him notice of the dishonor, and found the office locked and no one there with whom notice could be left; and in that event notice, properly addressed, deposited in the post office, will suffice.—*S. C.*
 6. *Notice sent by mail; what not necessary to proof of*.—It is not necessary to give notice to produce the notice sent by mail, as a preliminary to making proof of its contents.—*S. C.*
 7. *Bond; what does not destroy negotiability of*.—A provision in a bond for payment of money, payable to bearer, issued and put in circulation by a corporation, that the bond might "be registered and made payable by transfer only on the books of the company," does not of itself make such bonds non-negotiable by mere manual transfer.—*S. & M. R. R. Co. v. Lancaster*, 555.
 8. *Promissory note; what will not defeat recovery on*.—The purchaser at an administrator's sale of land, can not defeat a recovery on the purchase-money notes, or rescind, because a person interested in the estate, but with whom the administrator had no connection, employed a person who was obnoxious to the purchasers to bid against them, by reason of which and the desire of the purchasers to keep such person out, the purchasers bid more than the value of the land.—*East v. Wood*, 313.

BILL OF LADING.

1. *Bill of lading; negotiability of*.—A bill of lading issued by a railroad company for the receipt of cotton for shipment, does not stand in the category of commercial paper. A merchant who advances money to a person not the owner, on the strength of the bill of lading, does not thereby acquire a lien on the cotton, or right of property therein.—*Moore & Co. v. Robinson*, 537.

BOARD OF REVENUE OF MONTGOMERY.

1. *Board of Revenue of Montgomery; what best evidence of proceedings of*.—The "Board of Revenue of Montgomery," is an inferior jurisdiction, required by statute to keep a record of its proceedings, and to appoint

BOARD OF REVENUE OF MONTGOMERY—*Continued.*

a clerk, who is keeper of its records. It has authority to hire out convicts sentenced to hard labor; and where a person deduces his authority to the custody of a convict from a contract with the Board, a transcript from its records, duly certified by the clerk, is the best mode of proving the exercise of its power.—*Taylor v. State*, 164.

BONDS. See OFFICIAL BONDS—BILLS OF EXCHANGE AND PROMISSORY NOTES.

CERTIORARI.

1. *Common law certiorari; what proper judgment on.*—Where proceedings of the Commissioners' Court have been removed on common law writ of *certiorari*, to the Circuit Court, that court can only enquire whether enough affirmatively appears from the record sent up, to maintain the jurisdiction and decree of the lower court, and must affirm or quash the proceedings accordingly—the trial is not *denovo*.—*Ex parte Madison Turnpike Co.* 93.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Jurisdiction of Chancery to instruct and direct trustee.*—The limits and extent of the jurisdiction of Chancery to instruct and direct one standing in a fiduciary relation, in the execution of his trust, and the circumstances and class of cases in which the fiduciary can invoke its aid and direction, have not been clearly defined.—*Clay, Adm'r, v. Gurley, Adm'r*, 14.
2. *Same.*—The most common instances of the exercise of the jurisdiction, are where it has become important to avoid responsibility on the part of the executor, trustee, &c., to have a deed or will, of doubtful meaning or effect, construed; or where doubts or disputes have arisen concerning the shares of an estate or fund to be distributed, to which the beneficiaries, whether legatees, distributees, or creditors, are respectively entitled; and in some cases (though since the enactment of our statutes regarding the settlements of insolvent estates of decedents, such a bill can rarely be necessary,) to restrain creditors or legatees from prosecuting suits against the personal representatives, and compelling them to bring their claims into the Court of Chancery for settlement there, when the assets can not readily be got in, and it is uncertain whether he can safely omit to plead that he had fully administered, or *plene administravit prater*, a sum required to pay preferred debts.—*Ib.*
3. *Same; what not within.*—This jurisdiction can not be so perverted as to allow an administrator, on bill seeking the advice and direction of the court, to place it in the relation of his general legal adviser, as to the validity of claims, or the bringing of suits against persons, who, in separate transactions with the deceased, or with the administrators of his estate, may have come under liability to a subsequent administrator; nor can the court be called on to decide in this way, the right between the administrator and those who, claiming title, refuse to give up property on his adverse demand, or to determine a liability to him of a third person, in no way interested in the distribution of the estate, asserted on the one side and denied on the other.—*Ib.*
4. *Jurisdiction to remove cloud on title.*—Where the purchaser of lands is in possession, claiming under a void conveyance showing its own invalidity, equity will not take jurisdiction to declare the sale void, and to cancel the conveyance made in execution of it, but will leave the owner to his remedy at law.—*Mitchell v. Spence*, 450.
5. *Pecuniary legatee; when equity will interfere with executor, to secure legacy.*—Formerly, it seems, equity would not interfere at the instance of a pecuniary legatee, whose legacy was payable in the future, to compel the executor to give security for its payment, or to pay it into court, unless the legacy was absolute; but the modern doctrine is that the court will intervene, though the legacy is contingent, if sufficient reason be shown for such interference; whether in the one case or the other, the legatee's right to relief depends on the existence of assets liable for

CHANCERY—Continued.

the satisfaction of the legacy, which it is the executor's duty to hold for its payment, when it is due.—*Randle v. Carter*, 95.

6. *Removal of administrator, power of Chancery Court to decree; when should not be done.*—Whether, in any case, the Court of Chancery can remove an administrator, deriving authority from a grant of letters by the Probate Court, is not decided; but if it has such power, only an extreme case will justify its exercise, and the removal can not be made, unless fraud or some distinct ground of removal, in the Probate Court, is clearly shown.—*Ib.*
7. *Receivers; when power of appointing should not be exercised by Chancery Court.*—In general, creditors, legatees, or next of kin, can obtain ample protection against loss, and security for faithful administration, by a resort to the Probate Court; and hence, though a court of equity has jurisdiction to appoint a receiver of assets, practically taking the administration into its own hands, it will not exercise this jurisdiction, unless there is manifest danger of loss, which may be irreparable.—*Ib.*

See FRAUDULENT CONVEYANCES,

PLEADING AND PRACTICE.

8. *Complainant's title and right to relief; how must be stated.*—Matters essential to complainants' title and right to relief, must be shown by clear and unambiguous averments in the stating part of the bill; and though, on demurrer, the court might not feel bound to refuse, it can not be required to seek explanation of a defective allegation in the stating part of the bill, by reference to a clear averment of the same matter in a subsequent part; yet in the absence of allegation in the stating, or any other part of the bill, of material facts or transactions on which the title depends, the description or designation of plaintiffs as "trustees," or as "certain holders of bonds and coupons," and the like, is insufficient.—*S. & M. R. R. Co. v. Lancaster*, 555.
9. *Amendment; what may introduce.*—An amendment may introduce new matter, where it consists of facts occurring after the filing of the original bill, pertaining and not foreign to the matter of the original bill; and where the amendment abandons any claim, as to one of the matters as to which relief is sought, this cures any objection on the ground of multifariousness, because the claim thus abandoned was joined with others, as to which it had no necessary or proper connection.—*Alabama Warehouse Co. v. Jones*, 550.
10. *Foot note; when not necessary.*—Where there is a proper foot note to the original bill, and an amendment allowed, by striking out certain paragraphs, and inserting certain allegations in lieu of one of the paragraphs the defendants were required to answer, no additional foot note is necessary.—*Ib.*
11. *Bill; what multifarious.*—A bill which seeks relief against a note made by complainant, and fraudulently altered without his consent, in material particulars, joining with parties interested or concerned in the note, other defendants who have no connection or interest in the matter, is multifarious; so, also, is a bill by a tenant in common of a mill, seeking an account of rents and profits from his co-tenants, who had exclusive use and possession, and joining as defendants with his co-tenants, persons who have no interest in or connection with the claim.—*Johnson v. Parkinson*, 456.
12. *Lapse of time; how may be set up.*—It is settled in this State, that in courts of equity lapse of time rendering a demand stale, or the statute of limitations, the bill disclosing that the claim or demand is obnoxious to either, may be taken advantage of by answer or demurrer, as well as by plea.—*Greenlee v. Greenlee*, 330.
13. *Bill in; what multifarious.*—The fact that the bill is filed to obtain the advice and direction of the court, will not authorize the joining in the same bills defendants against whom relief is sought, as to several and independent transactions, with which many of them have no necessary connection or interest; the reason of the rule against multifariousness

CHANCERY—*Continued.*

- applies as strongly to a bill of this kind as to any other.—*Clay v. Gurley*, 14.
14. *Bill for foreclosure; what not demurrable.*—A bill to foreclose a deed of trust to secure bonds issued and put in circulation by a corporation and made payable to bearer, is not demurrable, because it fails to allege to whom such bonds were negotiated in the first instance, or how much was paid for them, or when they were issued.—*S & M. R. R. Co. v. Lancaster*, 555.
 15. *Same.*—Where a deed of trust or mortgage, made by a railroad company to secure an issue of bonds and interest thereon, provides that in default of payment of interest for six months, the principal should also become due, a bill by the trustees for foreclosure, averring such default in payment of interest, is not demurrable, because it fails to allege that the interest coupons were presented for payment at the office or agency at which they were payable.—*Ib.*
 16. *Account; what proper statement of.*—In taking an account of rents, after a decree rescinding a contract and conveyance of lands in exchange, where complainant, in pursuance of the contract, retained possession of part of the tract sold, and also another part contrary to its terms, respondent leasing and paying rent for the part retained under the contract, respondent should not be charged with the whole rental value of the premises for the year, but is entitled to have deducted from it the amount of rents paid by him, and the value of the occupation of that portion which complainant retained contrary to the terms of the exchange.—*Einksey v. Veasy*, 421.

CHARGE OF COURT.

1. *Charge; what should be given.*—Although a plea may be bad on demurrer, if the plaintiff takes issue on it, a charge directing the jury to find for the defendant if the evidence sustains the plea, should be given.—*Moore & Co. v. Robinson*, 535.
2. *Charge; what improper.*—A charge to the jury, that if "they believe from the evidence that plaintiff acquiesced in the act of the shipper, by which the cotton was shipped to defendants in his (the shipper's) name, then the law is that the plaintiff is estopped from complaining of the consequences of the assumption of ownership on the part of the shipper," is erroneous, and properly refused.—*Ib.*
3. *Charge; what properly refused.*—Whether or not written or printed pamphlets "warranted guano to produce beneficial results," is a question of law for the decision of the court, and a charge which submits that question to the jury is properly refused.—*Cleghorn, Assignee, v. Lingold*, 235.
4. *Same.*—A charge which requires the owner of cotton which had been shipped by an agent, in violation of instructions, in his own name, to notify the consignee on the day of shipment, that the cotton was his, and wrongly shipped in the name of the agent, asserts too strict a rule of diligence, and is properly refused.—*Moore & Co. v. Robinson*, 535.
5. *Charge; what erroneous.*—It is error in the court in its general charge, to refer to authorities cited by counsel "as being so like this case in its facts," &c. Such a charge is a charge on the effect of the evidence, and has a tendency to mislead the jury.—*Ib.*
6. *Charges; when may be refused.*—When a party requests charges which, though separately numbered, were not separately asked, and any of the charges thus asked are erroneous, the court is not required to distinguish between the good and bad, but may refuse them all.—*Eagle and Phoenix Manuf'g Co. v. Gibson*, 370.

See CRIMINAL LAW.

CODE OF ALABAMA. See STATUTES, CONSTRUCTION OF

COMPROMISE. See BASTARDY.

CONFLICT OF LAWS.

1. *Mortgage; by what law governed.*—Where the mortgagor and mortgagee reside in Georgia, and all the transactions between them take place in that State, and the mortgage does not designate any particular place of payment, the law of that State determines the validity and operation of the contract, and such contract will be enforced so far, and only so far, as it is valid under the laws of that State, no matter where the enforcement is sought, unless it offends the positive law, or violate the public policy of the State in which enforcement is sought.—*Cubbege, Hazlehurst & Co. v. Napier*, 518.

CONSTITUTIONAL LAW.

1. *Act of February 23, 1875; how far inoperative.*—The act to restrict the power of taxation, &c., approved February 23, 1875, so far as may be supposed to relate to the capital stock of national banks, is inoperative. *Sumter County v. Gainesville National Bank*, 464.
2. *Subdivision 7, section 369, of Code of 1876; constitutionality of.*—So much of section 369, subdivision 7, of the Code of 1876, as provides for the collection of a State tax of seventy-five cents on each share of the capital stock of national banking associations, &c., and providing that such taxation shall be in lien of all other State, county, and municipal taxation on such shares, is in conflict with the constitution, and void.—*Ib.*
3. *Same; what part of inoperative.*—That part of said subdivision which exacts that said tax "shall be paid by each such associations for the shareholders thereof," being dependent upon the other unconstitutional portions, and incapable of independent operation, is inoperative, and imposes no duty on the national banks to pay such taxes.—*Ib.*
4. *Statute; what will not invalidate.*—If a statute contains provisions which are not referable to its title, and such foreign matter is divisible from that which is clearly within the title, and the latter can stand and have effect without the former, then only so much of the act as is not embraced by the title is void.—*Ex parte Moore*, 471.
5. *Title of act; what within*—Where the title of an act is "to incorporate the town of Munford, in the county of Talladega," the insertion of a section in the act which makes it misdemeanor to sell or give away spirituous liquor within the corporate limits, is within the purview of the act, and sufficiently expressed in the title, and is constitutional.—*Ib.*
6. *Trial by jury.*—In a summary proceeding under § 206, to compel the delivery of books and papers of a public office, the defendant is not entitled to trial by jury.—*Chambers v. Stringer*, 596.

CONTRACT. See BAILMENT, 1-3—VENDOR AND PURCHASER; CORPORATION, 1.

CONVEYANCE.

1. *Conveyance; what will not pass title.*—A conveyance of lands held adversely at the time to the grantor, especially where he has been defeated in a suit to annul the deed under which the adverse claimant held, will not pass title to the grantee, and as to lands thus adversely held, there is a breach of covenants of seizin in the deed.—*Lindsey v. Veasy*, 421.
2. *Deed of corporation; what sufficiently executed.*—Where a conveyance or deed purports on its face to be the deed of the corporation, and recites that it has caused its corporate seal to be thereto affixed, and its president to sign the same, and the deed is properly witnessed or acknowledged, this is a sufficient execution; and the validity of the deed is not impaired by the fact that the president signed the deed in his own name with the word "president" added, or that the secretary likewise signed his own name to it in the same way.—*S. & M. R. R. Co. v. Lancaster*, 555.
3. *Title to land; what writing ineffectual to pass.*—An instrument of writing not attested by any subscribing witness, nor proved or acknowledged before a proper officer, is ineffectual to pass the legal title to land, and cannot be made the basis of recovery or defense in an action of ejectment.—*Wilson v. Glenn*, 28.

CONVEYANCE—Continued.

4. *Deed; consideration of, what may be shown by parol.*—Although the consideration of a deed is stated to be money paid to the grantor, it may be shown by parol that the real consideration was the extinguishment of a debt of the grantor; both considerations being of the same kind or degree, and the admission of the parol evidence not varying or contradicting the legal effect of the instrument.—*Mason v. Buchanan*, 110.
5. *Certificate of acknowledgment; how may be impeached.*—The official certificate of acknowledgment of a deed, conforming substantially to the requirements of the statute, is presumed to be true, and is protected by the presumptions which the law indulges in favor of official probity. The burden of proof rests on those who assail its truth, and it can be impeached only by clear and convincing evidence of its falsity.—*Barnett v. Proskauer*, 486.
6. *Registration; statute of, construed.*—The statute of registration, under the operation of which a junior conveyance may take precedence of a senior conveyance of the legal estate, saves the priority of the senior conveyance, if recorded within three months after its date, over a junior conveyance that may be earlier recorded, though the junior grantee may not have had notice of it, and has paid valuable consideration.—*Betts v. Mullen*, 365.

CORPORATIONS.

1. *Corporation; how may make contracts.*—Unless restrained by legislative enactment to a specific mode of contracting, the contracts a corporation has power to make, may be made in the same manner or form in which a similar contract could be made by an individual.—*Trustee of University v. Moody*, 389.
2. *Same; legislative intention to absolve from debt; presumption as to.*—A legislative intent, upon change or reorganization of a corporation, to absolve it from existing liabilities, cannot be inferred, but must unmistakably appear.—*Id.*
3. *Deed of corporation; what sufficiently executed.*—Where a conveyance or deed purports on its face to be the deed of the corporation, and recites that it has caused its corporate seal to be thereto affixed, and its president to sign the same, and the deed is properly witnessed or acknowledged, this is a sufficient execution; and the validity of the deed is not impaired by the fact that the president signed the deed in his own name with the word "president" added, or that the secretary likewise signed his own name to it in the same way.—*S. & M. R. R. Co. v. Lancaster*, 555.
4. *Resolution authorizing issue of bonds and mortgage; what sufficient compliance with.*—A resolution of the board of directors of a corporation, authorized an issue of its bonds, prescribing only the amount and denomination of the bonds, what date and rate of interest they should bear, and that they should be payable in American gold coin, free from government taxes, in New York, and also authorized the execution of a deed of trust on all the road, franchises and property of the company, for the security of the bonds, without prescribing any other terms which the deed should contain. All the specified conditions were observed. The bonds were made payable twenty years after date; and in the deed of trust it was further provided that a foreclosure might be made to pay the whole debt, whenever default in payment of interest had continued for six months: *Held*—As to the terms of the trust deed, other than those prescribed in the resolution, it must be presumed that it was intended to be in such form and with such stipulations as are usual in such instruments; and as they are usually so drawn as to provide a foreclosure for the whole debt, on default of payment of principal or interest, the mortgage was not executed contrary to directions, or without authority.—*Id.*

CRIMINAL LAW.

ARSON.

1. *Arson; what sufficient allegation of ownership, in indictment for.*—Under our statutes, as at common law, arson is an offense against the possession rather than the property, and the possession, not the tenure or interest in the property, must be described; hence, in an indictment under the statute for the arson of a crib, ownership is property laid in one tenant who had actual possession and exclusive occupancy of the premises on which it was situate, under the contract with the co-tenant, though the fee was in the two jointly, as tenants in common.—*Adams v. State*, 177.

BIGAMY.

2. *Bigamy; what intent sufficient to support conviction.*—No other intent is necessary to support a conviction for bigamy, than that which must be inferred from the second marriage, knowing the first wife to be living, or not having a reasonable belief of her death; and a charge which, unexplained, would lead the jury to the conclusion that some other intent was necessary, is properly refused.—*Dolson v. State*, 141.

CARRYING CONCEALED WEAPONS.

3. *Pistol; what constitutes, within the meaning of statute against carrying concealed weapons.*—A person who carries concealed about his person, all the pieces of a pistol, which could readily be put together so as to make an effective weapon, is guilty of carrying concealed weapons, though at the time he carried them concealed, the pieces were separate and incapable of use as a fire-arm until put together.—*Hutchinson v. State*, 3.
4. *Concealed weapons; what justifies carrying.*—The purpose of the statute permitting the weapon to be carried concealed, was to provide precautionary defense against impending peril. It is not every idle threat that will justify the carrying of a concealed weapon; nor will a threat long made, and not attempted to be executed when it might have been, furnish such excuse; nor, on the other hand, is it necessary to bring a party within the exception, that the threat be then and there presently uttered; it is enough that a threat has been made, and stands uncanceled, by after reconciliation, or other evidence of its abandonment.—*Polk v. State*, 237.

CHARGE OF COURT.

5. *Charge; what not erroneous.*—The day of the homicide the defendant borrowed a "Rodgers knife," having a single blade four inches long, from a neighbor, saying "I may need it," and then went to a town, on his return from which that night the homicide was committed. After three other persons had started on horseback the defendant overtook them, and furnished a bottle of whisky, out of which three out of the four, defendant among them, drank until they became intoxicated. After this, defendant commenced abusing a brother of deceased, whereupon deceased said he would defend his brother. Defendant and deceased then got down and fought a short time in the dark. Deceased received five cuts from a knife, and died almost immediately. Defendant was bruised and had his ankle sprained. The court, after giving a general charge, and after charging the law as to persons voluntarily engaging in sudden fight, and one killing the other without any pre-existing malice, and that it would be manslaughter in the first or second degree, as the killing was intentional or unintentional, said further: "And to enable you to determine the intent, you may look to the proof in regard to the weapon, and the manner and extent of its use. One is presumed to intend what he really does do, with the use of those means which ordinarily and naturally accomplish the result. Thus, if one in such a fight should use a knife, capable of inflicting a mortal wound, and with it wound his antagonist four or five times, so that he died from it almost immediately, the intention to kill might be inferred

CRIMINAL LAW—*Continued.*

from the use of such a weapon. If, however, death resulted from fist or foot, or severe fall, the inference of the intent to kill might well be different." *Held*: The charge was not obnoxious to the objection that it singled out particular facts, and gave them too much emphasis; nor was it otherwise erroneous or unfair.—*Evans v. State*, 6.

6. *Charge; what proper.*—In charging the jury, the court may state the testimony which witnesses have deposed to, and should, in proper cases, lay down the rules by which the jury is to be guided in weighing it; and may explain controverted questions raised on the trial, and inform the jury on whom the burden of proof rests in each aspect of the case; but, in doing this, it should be careful not to give any undue prominence to any phase of fact which the testimony tends to establish; leaving the jury, when there is legal evidence bearing on the question, to determine its weight, under appropriate instructions.—*Ib.*
7. *Charge; when not ground for reversal.*—Where a charge asked, isolates certain enumerated facts or circumstances, and invokes instructions of the court on them, as circumstances specially to be weighed in the cause, the court, if it gives the charge, should accompany it with a fair and candid statement of any facts and circumstances pointing in an opposite direction; but the mere fact that a charge given has a tendency to mislead, is not ground for reversal; additional explanatory charges should be asked.—*Ib.*
8. *Charge; what error to refuse.*—When the circumstances of the case are such that the prisoner's failure to aid in the saving of a gin-house, with the arson of which he is charged, makes against him, and the State has proved a conversation between the prisoner and the prosecutor, in which the former stated his sickness prevented his going, it is error to refuse a written charge instructing the jury that "when the State called for the conversation between the prisoner and the prosecutor, defendant was entitled to have the whole conversation go to the jury; and what the prisoner said about being sick is evidence for him, and if the evidence is believed, it may be considered as sufficient excuse for defendant's failure to go to the gin-house while burning, and the jury should not consider that as a circumstance against him."—*McAdory v. The State*, 155.
9. *Same.*—It is error to refuse a written charge, in a criminal case, which asserts that it is the duty of the prosecutor to prove every material fact charged in the indictment, to a moral certainty, and to satisfy the minds of the jury of the defendant's guilt beyond all reasonable doubt, and if they have failed to do this, and the jury can account for defendant's innocence upon any reasonable hypothesis, in view of all the evidence—then they should find him not guilty.—*Ib.*
10. *Charge; what proper.*—When there is evidence of previous difficulties between the slain and the accused, and of a fight in which one is slain, a charge by the court, "that murder in the first degree is when a homicide is committed with a specific intention to take life, deliberately formed and acted upon, or where a killing results from a reckless disregard of human life; but if neither of the above ingredients is shown by the testimony, and the proof shows the killing was done with malice, it is murder in the second degree. If, however, it is shown by the testimony that the killing was not done with a specific intention, nor from a reckless disregard of human life, nor with malice, yet voluntarily done, it is manslaughter in the first degree; and if a killing is done under circumstances which do not make it murder in the first or second degree, or manslaughter in the first degree, and yet is done without legal provocation, and not in self-defense, it is manslaughter in the second degree,"—correctly states the law of homicide, and is properly given. *Myers v. The State*, 599.
11. *Charge; what erroneous.*—A charge which postulates as one of the elements of self-defense, *real intent* on the part of the assailed to take life, or do some grievous bodily harm to the assailant, is erroneous. Such intent need not exist in fact; if, by some present act or demon-

CRIMINAL LAW—Continued.

stration of the assailed, he induces in the mind of the slayer a reasonable belief that danger to his life or person is imminent, this is enough, though in fact the party slain had not such intent.—*Rogers v. The State*, 170.

12. *Charge; what properly refused.*—When a criminal intent is dependent on knowledge of particular facts, ignorance or mistake as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal liability; and whether or not such belief is honest or feigned, and whether or not there was fault or negligence in not acquiring proper knowledge, are matters for the determination of the jury; and a charge which instructs the jury that a mistaken belief as to facts constitutes a defense, but withdraws from their determination the honesty of defendant's belief, and the diligence he had exercised to properly inform himself, is properly refused.—*Dotson v. The State*, 141.
13. *Same.*—A charge requested, which requires explanation or qualification, or which has a tendency to mislead and confuse the jury, should be refused.—*Ib.*
14. *Charge; what properly refused.*—A charge that the defendant could not be convicted for larceny of a horse, if he had the honest belief, at the time of the taking, that he had authority from the owner of the horse to take and use him, to avoid arrest by revenue officials, is properly refused, where there is evidence of a clandestine taking by defendant in the night time, without any attempt then or afterwards to notify the owner, and no evidence that he was pursued or in danger of arrest at the time of the taking. Such a charge ignores the inquiry whether the horse was taken, under such authority, to avoid arrest, and renders the defendant guiltless if he had such belief, though the defendant did not choose to avail himself of such license, but feloniously took the horse to convert it to his own use.—*Durrett v. The State*, 434.
15. *Charge; what erroneous.*—Where the conduct, demeanor, or expressions of the prisoner are relied on as indications of conscious guilt, and their weight and importance depends wholly on their combination with other inculpatory facts, the court should carefully instruct the jury as to the caution with which they should be received, and that it is from their connection with other facts that their whole value should be determined; and it is error to single out one such fact, separating it from the combination of facts, which alone gives it force as criminating evidence, and instruct the jury that they may look to it alone, as tending to show the prisoner's guilt.—*McAdory v. The State*, 154.
16. *Charge; what erroneous.*—Under an indictment for the offense denounced by section 4205 of the Code of 1871, a charge which is so worded as to require the acquittal of the defendant, if he did not sell, or intend to sell, to a person of known intemperate habits, though he may have aided and abetted the giving of the liquor to him, is erroneous.—*Walton v. The State*, 197.
17. *Charge; what erroneous.*—It is not error to refuse a charge in a criminal case, "if any individual juror is fully convinced from the evidence, beyond a reasonable doubt, that the defendant is guilty of any particular degree of homicide, and he becomes fully satisfied that his fellows will not agree with him, he might, from considerations of public good, and in order to agree with his fellow jurors, find the defendant guilty of a lower degree of homicide, or even find him not guilty; but it would be rank injustice to the defendant, and a failure to perform the high duty devolved on him as a juror, if he should, against his own conviction from the evidence, in order to agree with his fellows, find for a higher offense than he would otherwise have done, or find the defendant guilty, when he otherwise would have found him not guilty."—*Evans v. The State*, 6.

CHANGE OF VENUE.

18. *Change of venue; ruling of lower court on, not revisable.*—The decision of

CRIMINAL LAW—Continued.

the primary court refusing a change of venue, is not revisable.—*Evans v. State*, 6.

CONFESSION.

19. *Confessions; rule as to admission of.*—Where a confession has been obtained by improper influences, subsequent confessions, while such influence continues, are inadmissible; but there is no rule that because one person applies such influences and they are unavailing, subsequent confessions made to other persons will be presumed to have been induced by them.—*McAdory v. State*, 154.

CONFESSION OF JUDGMENT.

20. *Confession of judgment for fine; effect of.*—Parties voluntarily confessing judgment with the defendant, for the amount of the fine imposed, on his plea of guilty to a criminal charge, can not raise any question as to the power of the court to impose a fine on that conviction of such an offense; the confession is a release of error, and by the confession of judgment for money, the case assumes the form and qualities of a civil suit.—*Hearn v. State*, 218.

DEMURRER TO EVIDENCE.

21. *Demurrer to evidence; when permissible.*—In civil cases either party may, as matter of right, interpose a demurrer to evidence, in which the opposite party will be compelled to join, if the demurrer is not frivolous; but the provisions of the Code on that subject, which repeal the common law, so far as inconsistent with them, are limited by their terms to civil cases.—*Martin v. State*, 240.
22. *Same; disapproval of, in criminal cases.*—While the accused in a criminal cause may, by consent, demur to the evidence, the court disapproves as a dangerous practice, the resort by a defendant to a demurrer to the evidence, thereby burdening himself with the rigid technical rule, that he admits every inference or deduction the jury could legally deduce.—*Ib.*
23. *Evidence; what not sufficient to sustain judgment on.*—Where there is no evidence of the venue, a demurrer to the evidence should be sustained; and a judgment of conviction on such evidence will be reversed.—*Ib.*

EVIDENCE.

24. *Evidence; what admissible.*—No unerring or certain general rule can be laid down governing every case, as to when collateral and extrinsic facts become relevant and material testimony, as shedding light on the motive or intent with which a criminal act was done; and while care must be exercised not to open too wide a field for extrinsic exploration, yet collateral or outside facts, tending naturally to elucidate the act or intent charged, and pointing directly to the question in controversy, not merely furnishing material for comparison, are admissible.—*Durrett v. State*, 435.
25. *Same; what not admissible.*—On the trial of an indictment for larceny of a horse, the taking of which, clandestinely in the night time, was not denied by the defendant, who did not inform the owner afterwards, the issue being only as to the intent of the taking, whether felonious, or under an honest belief that he had a license from the owner to use the horse in escaping from revenue officers—evidence that the owner knew defendant had been engaged in illicit distilling, and on one occasion had found a keg of whiskey under his steps, which had been put there the night before, and “from some things which had occurred between them before, he supposed the defendant had put it there,” is inadmissible, though proposed in connection with evidence showing “intimate personal and social relations between them, and that defendant had furnished whiskey to the prosecutor, which he knew had been made by defendant, in violation of the United States revenue law, before the

CRIMINAL LAW—*Continued.*

- horse disappeared, and that the prosecutor had told defendant that he might have his horse, at any time, to escape or avoid being arrested for violations of the revenue laws of the United States."—*Ib.*
26. *Same.*—Nor is evidence admissible, that some time before the taking of the horse, the revenue officers had sought to arrest defendant while at work in a field, and fired upon him as he fled, and at other times had threatened to kill him; or that on one occasion he had attempted to flee the country, but forbore to attempt it, for fear of being arrested on the railroad train—there being no evidence that at the time of the taking of the horse, the defendant was in such danger of arrest as to prevent his then notifying the owner of the horse, or afterwards informing him of the taking.—*Ib.*
27. *Same.*—Where two separate and distinct conversations take place between the prisoner and the witness, proof by the State of one of the conversations, will not authorize the defendant to prove the other conversation.—*Ib.*

EVIDENCE.

28. *Evidence; what admissible.*—Any indications of a consciousness of guilt, by a person suspected of, or charged with crime, or who may, after such indications, be suspected or charged, are admissible evidence against him; and the number of such indications can not be limited, or their character or nature be defined.—*McAdory v. The State*, 154.
29. *Same.*—When it is clear that the particular conduct or declarations have no relation to the offense, and ought not to have any weight with the jury, the court should reject them as evidence; but however minute or insignificant they may be, if they tend to elucidate the transaction, they must be admitted.—*Ib.*
30. *Same.*—Where a conversation with the prisoner is offered against him, he has the right to have all that was said at the time, on the same subject, laid before the jury; but a conversation can not be excluded because the witness with whom it was had, detailing all of the conversation he heard, states that if the prisoner made any reply to the last remark of witness, in the conversation, he did not hear it; especially so, where there were other witnesses present, by whom the prisoner could prove his reply, if material.—*Ib.*
31. *Same.*—On the prisoner's trial for the arson of A's gin-house, the State may show, by a witness who went to a group of persons, among whom was the prisoner, to request them to desist from loud talking, which disturbed services at a church, that defendant, when he saw witness, said he supposed witness had been to another county to find out who burned A's gin-house, to which the witness answered, "It is a lie;" and, also, that witness made another remark, about what he heard the prisoner had said about burning the gin-house, though the witness stated he did not hear the defendant's reply, if he made any.—*Ib.*
32. *Same.*—Evidence of assaults and threats by the prisoner, against the prosecutor, on the same evening and prior to the assault for which the prisoner is indicted, is admissible in behalf of the State to show with what intent the last assault was made.—*Ross v. The State*, 224.
33. *Same.*—It is not error to permit a witness to testify, on the trial of a criminal case, that a person who was with the prisoner was his tenant, when the matter was not at issue, and arose only incidentally and collaterally.—*Ib.*
34. *Same.*—Acts of persons who were present and apparently co-operating with the prisoner in his attempt to intercept the prosecutor, on the occasion of the assault, are admissible evidence as part of the *res gestæ*, on behalf of the State.—*Ib.*
35. *Evidence; what not admissible.*—What the prisoner said to his physician, the day after the fight, when the latter came to treat him for the hurts received in the fight, as to what the prisoner had eaten, and the medicine he had taken the day before, is not competent evidence in behalf of the accused, on trial of an indictment for the assault.—*Ib.*

CRIMINAL LAW—Continued.

36. *Same*.—What the prisoner testified, in a civil suit against him by the prosecutor for the assault, is not admissible evidence in the accused's favor, when indicted for the assault.—*Ib*.
37. *Same*; *what admissible*.—In proof of motive to commit the crime, it may be shown that a person other than the owner of the gin-house which the prisoner was charged with burning, had property therein, and that the prisoner had malice towards him.—*McAdory v. The State*, 154.
38. *Same*.—When there is an absence of proof as to the attitude of the parties at the outset of a fatal rencontre, evidence of statements by the deceased of his purpose in visiting the place at which the difficulty took place, should be received to show the state of feeling between the parties.—*Myers v. The State*, 599.
39. *Same*.—Threats made by the accused prior to the killing are admissible against him on a trial for the killing.—*Ib*.
40. *Same*.—The enmity or unfriendliness of a witness, to the person against whom he testified, may be shown to enable the jury the better to determine, in connection with other evidence, what weight should be accorded to the witness; but it is not permissible to prove the details of a quarrel or difficulty which gave rise to the enmity or unfriendliness.—*Poll v. The State*, 237.
41. *Same*.—Persons observant of, and familiar with the intercourse between others, and conversant with the state of feeling, as shown by their conduct and conversation, may testify as to a fact whether or not enmity or ill feeling existed between them.—*Ib*.
42. *Same*.—Evidence of threats against the life of the accused, is always admissible in defense of a prosecution for carrying concealed weapons; the weight to be attached to such threats being matter for the determination of the jury, who must ascertain the real purpose, or what seemed to be the real purpose, of the person making the threats or hostile demonstration, and the real not feigned sense of insecurity or peril under which the threatened party labored, when the weapon was carried concealed.—*Ib*.
43. *Same*; *what inadmissible*.—A constable, and several persons whom he had summoned to aid in executing a warrant for the arrest of the defendant, went to defendant's house, before day, and aroused him, and, in answer to a question of the defendant as to who was present, the constable stated the names of several persons who were not in fact present; among them, one T. After this, defendant shot and killed B., one of the posse. *Held*, error to permit the State, against the objection of the defendant, to show by T. that the constable had, in fact, summoned him, especially as the constable had not informed defendant of the fact; and the evidence being illegal, it necessarily worked a reversal of the case, the court being unable to determine that the evidence could not have prejudiced the defendant.—*Rogers v. The State*, 170.
44. *Same*; *what admissible*.—Conversation or remarks of the prisoner "a short while before the killing, while in company with the deceased and others," is admissible in behalf of the State, if relevant to the issue; and its admission, if not relevant, is not ground of error, if the testimony was favorable to the defendant.—*Evans v. State*, 6.
45. *Same*.—A remark of the defendant to a witness, on seeing the deceased ride up to a church, two or three years before the killing, "there is a man I cannot get along with," though of little weight of itself, is relevant and admissible testimony, and is properly admitted, when the only objection urged is that it is not legal or lawful evidence.—*Ib*.
46. *Same*.—The credibility of evidence is a pure question for the jury. When the testimony tends to elucidate a material issue in the case, no matter how little light it may shed on the controverted question, it must be received, and its weight and credibility left to the jury.—*Myers v. The State*, 599.
47. *Same*; *what inadmissible*.—Statements or threats by the deceased, a day or two before the killing, and not communicated to the slayer, are not admissible evidence in his favor, where the homicide is proved by direct evidence.—*Rogers v. The State*, 170.

CRIMINAL LAW—Continued.

HOMICIDE.

48. *Self-defense; what is.*—Where it is shown that the accused and the deceased had quarreled on the day previous to the killing, and that when they met on the day of the killing, the accused commenced the fatal quarrel and made the first hostile demonstration, and advanced on the deceased in a threatening manner, the deceased could strike in anticipation, provided he did not employ unreasonable force in repelling such assault, and such blow would be self-defense, although the first stricken.—*Myers v. The State*, 599.
49. *Killing; what will not justify or excuse.*—When the accused is the aggressor, and is threatening the deceased with present danger, a blow struck by the deceased, although first struck, if not greatly disproportionate to the peril, will neither excuse nor mitigate the killing; and, in such a case, the previous state of feeling between the parties, or the fact that the deceased had made threats, should exert no influence on the decision of the case, unless there was some present impending purpose, real or apparent, to carry out such threats.—*Ib.*
50. *Killing; what cannot be set up to excuse.*—A slayer cannot urge, in his own justification, a necessity produced by his own wrongful and unlawful act, as a valid reason for killing his assailant.—*Kimbrough v. The State*, 248.
51. *Malice; presumption as to.*—The law implies malice from the intentional unauthorized use of deadly weapons, if there be nothing else in the transaction to repel the implication.—*Grant v. The State*, 234.

INDICTMENT.

52. *Different offenses; what, indictments charges prima facie.*—*Prima facie*, an indictment against James Henry Smith for uttering vulgar language in the dwelling-house of John S. Turner, charges a distinct offense from that set forth in an indictment against Henry Smith for uttering such language in the dwelling-house of Sarah Holly; and where the former indictment and proceedings thereon are relied on to prevent the defense of the statute of limitations against the last indictment, it must be shown that the same offense and offender were charged in both indictments, and this may be done by parol.—*Smith v. The State*, 229.
53. *Indictment; finding of; what does not prevent statute of limitations from running.*—An indictment for keeping or exhibiting a table for gaming, is not a continuation of a prosecution for setting up a lottery; and hence the finding of an indictment for the latter offense, cannot prevent the bar of the statute from running against an indictment for the former.—*Buckalew v. The State*, 334.
54. *Petit larceny; what indictment will not support conviction for.*—Under the statute making it a felony to steal any corn or cotton, "part of any outstanding crop"—this not being the subject of larceny at common law, and the statute having made it punishable as grand larceny only—there can be no conviction of petit larceny, though such part of the outstanding crop be described as the personal property of another, of value less than the amount necessary to constitute grand larceny.—*Pinkard v. The State*, 167.
55. *Indictment; what sufficient.*—An indictment for the offense of selling liquor to a minor, which follows the form laid down in the Code, is sufficient.—*Spigener v. The State*, 383.
56. *Same; what not ground for quashing, or striking from the files.*—When a bill of indictment is returned into court by the foreman, in the presence of at least twelve of the grand jury, it is not permissible, in support of a motion to quash or strike from the files, to show by the parol testimony of some of the grand jurors that twelve of the grand jury did not concur in the finding.—*Ib.*

JURY—JURORS.

57. *Jury; what properly organized.*—The fact that one or more of the persons on the venire served on a prisoner, charged with a capital offense, were

CRIMINAL LAW—Continued.

- on the regular juries for the week, and could not be obtained as jurors for the prisoner's trial, because then engaged on the trial of another cause, gives the prisoner no right to delay the impanneling of the jury for his own trial, until such persons are discharged as jurors on the other case, or to otherwise delay the trial.—*Kimbrough v. The State*, 248.
58. *Grand juror; age of, who cannot complain of.*—The fact that one of the grand jury finding the indictment was over sixty years of age, furnishes no ground for quashing or abating the indictment. The exemption of persons over sixty years of age is a personal privilege which they may waive.—*Spigener v. The State*, 383.
59. *Challenge; when right to not waived.*—The right of challenge is not lost until the juror is sworn or accepted for the trial of the issue; and when the juror is one of the regular panel for the week, the defendant does not lose his right to challenge until he accepts the juror for his trial. *Ib.*
60. *Challenge; rule of procedure as to.*—In all criminal prosecutions the State must be required to pass upon the jurors offered, before the defendant can be compelled to announce his acceptance or rejection of them.—*Ib.*
61. *Challenge of array of jurors; what not ground for.*—It is not ground for challenge to the "array," or of motion to quash the venire for a petit jury, that the officers drew the grand and petit jurors at the same time, and as the names were taken from the box, placed them alternately on the grand and petit juries, according to their respective localities and standing in the county—no unfairness being charged, and jurors having proper qualifications.—*Dotson v. The State*, 141.

LARCENY.

62. *Larceny; what necessary to sustain conviction in county other than that in which offense was committed.*—To authorize the conviction of a thief for larceny, in a county other than that in which the offense was committed, he must have had control, actual or constructive, of the stolen property in such county.—*Lucas v. The State*, 26.
63. *Same.*—Where a horse is stolen in one county, and the thief sells and delivers possession to another person, and the two go to another county, where the purchaser takes the horse, that the thief may there receive the balance of the price, the thief cannot be convicted of larceny in the latter county; but where the thief and another party merely exchange horses, to be re-exchanged at pleasure, and the two ride into another county, the thief may be there convicted of the larceny; for in the latter event the person making the exchange would be but the agent or instrument of the thief in bringing the stolen property into the county. *Ib.*

LOTTERY.

64. *Lottery; what constitutes.*—Lottery in its popular acceptance, is a distribution of prizes by lot or chance; and wherever chances are sold and the distribution of prizes determined by lot, this, it would seem, constitutes a lottery.—*Buckalew v. The State*, 334.
65. *Same; what does not constitute.*—Where money is put upon a round board in equal amounts, by several persons, each in turn whirling a hand fastened in the centre, the one at whose whirl the hand registers the highest number on the rim of the board, taking all the money on the board, the owner of the board sometimes putting up money and sometimes charging a small sum, to be paid by the winner, for the use of the board; this does not constitute a lottery, or render the keeper or owner of the board liable to indictment for keeping or setting up a lottery; but whether upon these facts the owner of the table is not indictable for keeping or exhibiting a table for gaming within the meaning of section 4208 of the Code, is not decided.—*Ib.*

CRIMINAL LAW—Continued.

MINOR, SELLING LIQUOR TO.

66. *Code of 1876, section 4205, what act within.*—Under section 4205 of the Code of 1876, the ownership of the liquor given to a minor is immaterial. It is the voluntary delivery into the possession of a minor, or person of known intemperate habits, with or without any thing being given in consideration, which the statute denounces and punishes.—*Hill v. The State*, 168.
67. *Intent; what sufficient.*—No other intent is necessary to support a conviction, than that which the act of voluntarily delivering the liquor to a person of known intemperate habits, or to one known to be a minor, of itself imports. When this act is voluntarily done, the law is broken.—*Ib.*
68. *Drunkenness; when no offense.*—As no particular intent, or mental status must have concurred with the act, to constitute the offense, the voluntary drunkenness of the defendant would furnish no defense, and constitute no excuse or palliation for the criminal act.—*Ib.*
69. *Code of 1876; § 4205 construed.*—Section 4205 of the Code of 1876, when construed in connection with the common law, embraces one who procures the act denounced by it to be done, although he may not actually commit the offense. It is enough that he be present, procuring or counseling, aiding or abetting, the person who actually delivers the liquor to one of the prohibited class.—*Walton v. The State*, 197.
70. *Same; what act within.*—A bar-keeper who sells liquor to a third person, with a knowledge that a person of known intemperate habits is to join in the drinking of it, and permits such intemperate to drink such liquor in his bar, or in his presence, is as guilty of the offense denounced by § 4205 of the Code of 1876, as if he had personally sold and delivered the liquor to such intemperate person.—*Ib.*

VERDICT AND SENTENCE.

71. *Copy of indictment served on prisoner; when objection to correctness of, comes too late.*—After pleading to a valid indictment, taking part in empanneling of a jury to try the issues, and entering upon the examination of witnesses, it is too late to raise the objection that the copy of the indictment served on the prisoner is incorrect, unless it be made manifest that thereby the defendant has been put to a disadvantage, which would probably lead to an unjust verdict against him.—*Evans v. The State*, 6.
72. *Sentence; when valid.*—The court disapproves the practice of sentencing persons to hard labor to pay the fine and costs, without specifying the amount of the fine and costs or number of days of labor; but the sentence is not invalid on that account.—*Walton v. The State*, 197.
73. *Indictment of person under alias; what sufficient proof to sustain.*—Where the defendant is indicted in his own name, and also under an *alias*, it is not necessary to show that he was known and called by both names; it is sufficient, if he is identified as the person known by or entitled to either of such names.—*Evans v. The State*, 6.

VULGAR AND ABUSIVE LANGUAGE.

74. *Highway; what is not, within the meaning of § 4203 of Code of 1876.*—The track of a railroad company, used to carry on its business as a common carrier, is not a public highway, within the meaning of the statute against the use of vulgar and abusive language. To constitute such highway, there must be a road dedicated to, and kept up by the public, as distinguished from a private way.—*Comer v. The State*, 320.

WITNESS.

75. *Witness; who incompetent.*—The husband of a woman, jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them on their trial for that offense.—*Cotton et al. v. The State*, 12.

DAMAGES.

1. *Damages; measure of.*—In the absence of fraud or bad faith, the proper measure of damages, in a suit by the purchaser of a safe against the maker, who warranted it "burglar proof," is the difference between the value of the safe as it was, and what it would have been worth, if it had been as represented; and not the damages sustained in the loss of valuables taken out of the safe by the burglars who effected an entrance into it.—*Herring, Farrell & Sherman v. Skaggs*, 180.
2. *Same.*—When, in such a case, the sale was made by an agent, and the suit is against the principal, damages resulting from the loss of valuables in the safe, can not be recovered, unless it be shown that he was a guilty participant in the agent's fraud.—*Ib.*
3. *Attachment bond; what damages recoverable on.*—The reasonable amount paid, or promised to be paid to attorneys for defending the attachment suit, and the value of time lost and expenses incurred in attending court for the trial, may be recovered in an action on the bond, for the wrongful or vexatious suing out of the attachment.—*Higgins v. Mansfield*, 267.
4. *Same; what damages too remote, for recovery on.*—Damage resulting from the demoralization of the plaintiff's hands, while he was absent from his farm, and procuring attorneys to defend the suit, or from plaintiff's being compelled to stop a double plow while he was absent, and the like, are too remote, and should not be estimated in fixing the value of plaintiff's services.—*Ib.*
5. *Cases approved.*—The cases of *Sims v. Glazener*, 14 Ala. 698, and *Burton v. Holly*, 29 Ala. 319, declare the true rule as to what damages are, and what are not too remote.—*Ib.*
6. *Railroad company; for what damage not responsible.*—A railroad company acquiring a right of way over lands, is not bound to plank or cover a culvert or drain, so as to prevent cattle from getting fastened therein; and is not responsible for the killing by its trains of cattle thus fastened, if it be shown that the company was duly diligent to prevent its trains from injuring them.—*M. & C. R. R. Co. v. Lyon*, 71.

DEFAULTER. See AUDITOR, 1, 2.

DEMAND.

1. *Demand; when must be made.*—Where a demand is essential, as a condition precedent to an action, it must be made in a reasonable time; the party bound to make it can not postpone it indefinitely, and thereby keep alive claims which would otherwise become dormant and stale; and what is a reasonable time within which to make demand, depends very greatly on the circumstances of the particular case.—*Wright v. Paine, Adm'r*, 340.
2. *Delay; what is unreasonable.*—Where a special deposit of coin was made for safe keeping, and more than seventeen years elapsed, the death of the depositary intervening more than two years, before suit was brought, and eleven years elapsed after the deposit before demand was made for its return, the delay, in the absence of all explanation, was unreasonable.—*Ib.*

DEVISE. See WILLS.

DOWER. See HUSBAND AND WIFE; EXEMPT PROPERTY, 3.

ERROR AND APPEAL.

I. WHEN APPEAL LIES.

1. *Appeal; when does not lie.*—When more than two years elapse after the rendition of a decree settling the equities of the parties, appeal subsequently taken will not bring up for revision matter passed on in such decree, but only such proceedings as are had in the cause, after such decree.—*Waldrop v. Carnes*, 374.
2. *Same.*—The fact that a married woman is "a free dealer," and authorized

ERROR AND APPEAL—*Continued.*

to contract as a *femme sole*, will not exclude her from the benefits of the statute (Code, § 3930,) authorizing married women to appeal from decrees or judgments subjecting their separate estates, without giving security for costs.—*Ware v. McDonald*, 81.

3. *Appeal; when allowance of, compelled by mandamus.*—A party against whom a decree is rendered, is entitled to an appeal as matter of right; and where the appeal is denied, and its allowance is sought to be compelled by *mandamus*, the court, in determining the application, will not look to the probable result of the appeal.—*Ib.*
4. *Same; who may appeal*—It is only a party or privy prejudiced by a judgment or decree, who can prosecute an appeal or *certiorari* for its reversal, and this rule applies as well to judgments rendered by justices of the peace, as to judgments of superior tribunals.—*Hunt v. Hurtz*, 36.

II. PRACTICE AND GENERAL PRINCIPLES.

5. *Presumption in favor of ruling of primary court.*—On collateral assault upon an order appointing an administrator *de bonis non*, it will be presumed that the authority of the administrators in chief had ceased, when all the evidence on that subject is the transcript of the proceedings introduced (which does not purport to set out all the record of the administration in chief), showing merely the order appointing them; that they had filed accounts and vouchers for a final settlement; that the judge of probate was incompetent, and therefore transferred the account and settlement to the register in chancery, and that the latter more than a year afterwards appointed an administrator *de bonis non*.—*Bean v. Chapman*, 58.
6. *Same.*—On collateral assault, an order of the probate court appointing the sheriff administrator of an estate, can not be held void, because the record does not disclose that there was no general administrator of the county, and no other fit person who would administer. As to such matters the court is one of original, general and unlimited jurisdiction; and the same presumption must be made in favor of its decree, as prevail in favor of decrees of courts of general jurisdiction.—*Burnett v. Nesmith*, 261.
7. *Same.*—On appeal from the judgment of a court of general jurisdiction, all presumptions in favor of its right action will be indulged, which are not repelled by the record; hence, where the judgment entry recites that the parties "waived all right of exemption as to personal property under the constitution and statute laws of the State," it will be presumed, on appeal, that there was a properly executed instrument in writing expressing such waiver.—*Hearn v. State*, 218.
8. *Rulings of lower court; what not revisable.*—The appellate court will not revise rulings of the primary court upon motions for the continuance of causes, or motions to set aside judgments and grant new trials.—*Trammell v. Vane, Calvert & Co.* 301.
9. *Plea; motion to strike from files, when action of court on revisable.*—The refusal to strike out a plea which is merely defective, not a nullity, is not revisable on error; as the primary court may, in its discretion, refuse to entertain the motion, and put the party to his demurrer; but the rule is different when the court entertains the motion and improperly strikes out the plea, if exception is taken.—*Linkford v. Green*, 314.
10. *Errors; what can not be corrected in appellate court.*—Errors, in taking an account, or confirming a report, can not be corrected here, unless first brought to the notice of the Chancellor by objection or exception; and where exceptions well taken to an account and report are withdrawn, it is an admission of their correctness, and precludes the raising of that question on appeal.—*Waldrop v. Carnes*, 374.
11. *Plea; rulings of primary court; how must be shown.*—Rulings of the primary court, in ordering a plea in abatement to the indictment to be taken from the file, will not be revised by the appellate court, when the plea itself and the rulings thereon do not appear from the record, or

ERROR AND APPEAL—*Continued.*

- by any minute entry, but are disclosed merely by recitals in the bill of exceptions.—*Ross v. State*, 224.
12. *Objection to bill; where must be first made.*—The objection can not be urged here for the first time, that a bill is too general in its allegation of facts requisite to authorize the removal of an administration, pursuant to an act of the legislature, when the defects in that respect could have been remedied by amendment, in the court below, if a demurrer had been there interposed, specially setting forth the ground of objection.—*Masterson v. Pullen*, 145.
 13. *Evidence; where objections to, must be primarily made.*—Objections can not be raised here to evidence, on the ground that it was secondary, without proper predicate for its admission, when no objection was raised on that ground in the court below.—*Id.*
 14. *Reversal; what not ground for.*—Where parol testimony of the contents of a bill and answer is unnecessary or superfluous, its introduction, even if erroneous, will furnish no ground for reversal.—*Adams v. Olive*, 418.
 15. *Same.*—While it is not usual for courts to interfere and rule out evidence which counsel is willing to let in, yet if the evidence is irrelevant or immaterial, the court may rule it out of its own motion, and its ruling furnishes no ground for reversal.—*Durrett v. State*, 435.
 16. *Error; what compels a reversal.*—However reluctant an appellate court may be to interfere with the discretion of the primary court in regulating the trial of cases, yet if it should appear that it had refused, to the prejudice of a party, to confine counsel to the law and evidence of the case—if it has permitted them to refer to and comment upon facts not in evidence, or which were not admissible as evidence—a reversal will follow.—*McAdory v. State*, 155.
 17. *Demurrer; rulings on, how must be shown.*—Rulings upon demurrer will not be revised, unless shown of record on the minutes; but it is not necessary that such ruling should appear in the final judgment entry, if the ruling appears from a separate, independent entry on the minutes.—*Bean v. Chapman*, 55.
 18. *Demurrer; what will be considered.*—This court can consider only such specific grounds of demurrer as were interposed in the court below; other grounds are waived.—*Ala. Warehouse Co. v. Jones*, 550.
 19. *Complaint; defects in, when cured by judgment.*—Whether or not a count in trover is demurrable, for a failure to lay the time of the conversation, the want of such averment is cured by judgment, without objection on that account in the court below.—*Russell v. Russell*, 48.
 20. *Decree; what can not be supported.*—A decree in equity, materially affecting the right and interests of infant defendants, can not be supported, when assailed on error, unless the record affirmatively shows that they were brought before the court in the mode prescribed by the rules of practice, and that a guardian *ad litem* had been regularly appointed to represent and defend them.—*Rowland et al. v. Jones*, 322.
 21. *Same; what will not uphold.*—The appearance and answer by a guardian *ad litem*, recognized by the court, if the guardian *ad litem* comes in without appointment, or under an irregular appointment, or under an appointment prematurely made, because service had not been perfected on the infant defendants, can not uphold the decree.—*Id.*
 22. *Certiorari; when refusal of, not ground for reversal.*—A refusal to award a certiorari to a justice of the peace to send up the original papers, together with the statement required on appeal to the circuit court, is not ground for reversal, when it appears from the whole record that awarding the writ would not have affected the result; the appeal bond being sufficiently formal to give jurisdiction, and it not being stated that the original papers would show a departure in the circuit court, or any reason shown why the writ should have been granted.—*S. & N. Ala. R. Co. v. Pilgreen*, 306.
 23. *Charge; what exception to, unavailing.*—A general exception to the entire charge of the court, consisting of separable and distinct propositions of law, will not avail the party excepting, unless the entire charge is erroneous.—*Herring, Farrell & Sherman v. Skaggs*, 180.

ERROR AND APPEAL—*Continued.*

24. *Errors; what not noticed.*—Errors assigned, but not insisted on in brief or argument, will not be noticed.—*Steele et al. v. Thompson*, 323.

ESTATES OF DECEDENTS.

1. *Persons interested in estate; who is.*—A creditor is a person interested in the estate, within the meaning of the statute authorizing requirement of security from an executor whom the will exempts from giving bond. *Phillips v. Smith*, 575.
2. *Debt against estate; how far should be enquired into.*—Where a creditor seeks to require bond under this statute, the court should entertain no inquiry as to the validity of the debt, further than to ascertain whether there is a *prima facie* liability against the estate.—*Ib.*
3. *Proceedings to require bond of executrix; who may maintain.*—It is not essential that a creditor instituting proceedings under the statute, should be able to prosecute suits at law in his own name on the debts he claims; though his claim be such that if driven to suit, he would have to use the name of some other person, yet, if he have the right to maintain such suit, and can receive payment and discharge the debt, he is interested in the estate, and may maintain the application in his own name.—*Ib.*
4. *Probate Court; jurisdiction to order sale of lands of decedent for division on application of executor.*—The jurisdiction of the court of probate to order a sale of lands on the application of a personal representative is statutory and limited, and when the ground of jurisdiction is a necessity for a division among heirs or devisees, the condition of the lands as to title must remain the same as it was at the death of the testator or intestate.—*Whorton v. Moragne*, 202.
5. *Same; when without jurisdiction to make order for sale of lands devised.*—Where, by the will, the testator devised his lands and the executors assented to the legacy, the probate court is without jurisdiction on the application of the executor to render orders of sale for the purpose of divisions, or to hold the executor responsible for money received from the sale of lands made under such orders.—*Ib.*
6. *Declaration of insolvency; effect of.*—A declaration of insolvency of an estate by the probate court, upon an administrator's report of its insolvency, does not *ipso facto* terminate his authority; and if he continues to administer the estate afterwards, the creditors not having elected or the court appointed another in his stead, his acts are valid, and the sureties on his official bond remain bound, as much so as if the estate had not been declared insolvent.—*Clay v. Gurley*, 14.
7. *Insolvent estate; decree of probate court on claims filed against; effect of; who may assail.*—The ascertainment of the validity and amount of the demand of a creditor, in the course of proceedings in insolvency in the court of probate, has the force and effect of a judgment *in personam* against the personal representative, obtained in the regular course of proceedings in a suit at common law, by a creditor; and as against legatees, who claim in privity with the personal representative, is *prima facie* evidence of the debt; and the legatee may assail such judgment for fraud, or when the administrator claims credit for it, show that defenses existed, and by proper diligence he could have prevented it from being obtained.—*Randle v. Carter*, 95.
8. *Sale of devised lands; who can not complain of.*—Although a sale of lands devised by the executor, may be void, as to the devisee, and the lands chargeable with a pecuniary legacy to complainant, such legatee can not complain of it, or have it set aside, when the devisee acquiesces, it not being shown that the lands sold for a sum disproportionate to their value, or would sell for more on a resale, or there had been a misapplication of the proceeds to the injury of the legatee.—*Ib.*
9. *Decree of insolvency; who can not assail.*—A decree of insolvency merely ascertains, as between the personal representatives and the creditors, the status of the estate; as to next of kin, or legatees, it is *res inter alios acta*, not affecting their rights, and not evidence against them of any

ESTATES OF DECEDENTS—*Continued.*

fact ascertained by it; and its validity is not affected, because legatees were not parties to the proceedings; and hence they can not assail it for fraud.—*Ib.*

ESTOPPEL. See EXECUTORS AND ADMINISTRATORS.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Admissibility of.*—Witnesses, particularly parties, should not, as a rule, be allowed to testify to secret uncommunicated motives of their own conduct, *thus*: In an action against a safe manufacturer (by a purchaser through the agent, who warranted it burglar proof), seeking to recover, as part of the damages, a sum of money lost by burglars breaking open the safe,—the purchaser cannot be permitted to state that, “had he (I) known the real thickness of the safe, I would not have risked my money in it as I did;” though he may testify that he did not know the real thickness until after the safe was broken, and that he confided in the agent’s representations; and it is for the jury to draw the inference, whether the purchaser would have risked his money in the safe had he known its real thickness.—*Herring, Farrell & Sherman v. Skaggs*, 180.
2. *Same.*—Where the plaintiff’s possession and the trespass complained of were subsequent to his discharge in bankruptcy, and the title of plaintiff is not involved, a plea of his bankruptcy is frivolous; though if the title had been involved, and it had become necessary for plaintiff to show title in himself at the time of the bankruptcy, the schedules filed with the plaintiff’s petition would be relevant evidence to show that the premises in dispute, if embraced in them, passed by operation of law to another; or, if omitted, to present that fact for the consideration of the jury.—*Lankford v. Green*, 314.
3. *Same.*—A judgment in ejectment, or in the statutory action in the nature of ejectment, binds only parties or privies; it is not evidence against strangers, and a party in possession at the time of the commencement of the suit, who is not made a defendant, is a stranger to the judgment, and cannot be affected by it.—*Ib.*
4. *Same; what admissible.*—Though a party relying upon a former decree as an adjudication of the subject matter, must produce the whole record, that the court may be able to construe the decree in the light of all the proceedings on which it is founded, yet if the only point of inquiry is the existence of the decree, an exemplification of the decree alone is sufficient, without proof of the other proceedings.—*Adams v. Olive*, 418.
5. *Same.*—A certified transcript from the general land office, showing a selection of lands for the benefit of a township, under the act of May 20, 1826, and its approval by the secretary as therein provided, is competent evidence to support an action of ejectment by the State, although such transcript fails to show on its face that the sixteenth section had been disposed of in the township to which the lands were allotted; the presumption being that all facts necessary to sustain the action of the secretary of the treasury existed; and the papers showing such selection being on file in the general land office, a certified transcript by the head of that department is admissible.—*Sprayberry v. The State*, 459.
6. *Same.*—Where the agent’s authority to warrant a safe as burglar proof, and the making of such warranty, are controverted in a suit against the principal, the latter may show by the agent that he had no express authority to make the warranty; and where the agent, pending the negotiations for the sale, exhibited to the purchaser a descriptive pamphlet, with which the agent was furnished, showing what classes of safes were and what were not represented as burglar proof, the pamphlet is competent evidence in behalf of the principal on the issue of warranty *vel non*.—*Herring, Farrell & Sherman v. Skaggs*, 180.
7. *Same.*—In an action to recover damages for the breach of an agreement to deliver cotton, in payment of the price of a fertilizer represented to be “Sea Fowl Guano,” and greatly beneficial to crops, the defendant

EVIDENCE—Continued.

- resisting recovery on the ground that the article purchased was not what he ordered, and was worthless, may testify as to the manner and effect of his use of it in the cultivation of the crop.—*Claghorn v. Lingo*, 230.
8. *Same*.—While evidence from parties to a suit, impeaching acts certified by an officer of the law, is jealously and carefully scrutinized, it is admissible to show the falsity of the certificate; and, when full and direct, is entitled to the same weight as would be accorded to the testimony of any other interested witness.—*Barnett v. Proskauer*, 486.
 9. *Same*.—When there are two causes between the same parties, it is permissible to show, by parol, in which of these causes a decree offered in evidence was rendered.—*Adams v. Olive*, 418.
 10. *Same*.—It is permissible for a witness to testify, as a fact, that he is in possession of land, and he may also testify that he derived his possession from one formerly in possession claiming title to lands.—*Eagle & Phoenix Manufacturing Co. v. Gibson*, 369.
 11. *Same*; *what irrelevant*.—In an action against a railroad company for killing live stock, at a locality not at or near any depot, road-crossing, town, or other place where the statute requires the whistle to be blown, speed reduced, &c., the inquiry, whether or not the engineer, after having run one or more trips, afterwards, could remember at what points, including depots, road-crossings, and towns through which he passed, he blew the whistle, rang the bell, &c., is irrelevant.—*M. & C. R. R. Co. v. Lyon*, 71.
 12. *Same*; *what inadmissible*.—A witness who testifies to the receipt of a telegram from the plaintiff, requesting him to notify the defendant that certain cotton was not the property of the shipper, but belonged to plaintiff, and that the telegram was sent by a messenger to the business house of defendants, cannot be permitted to testify what the messenger said, when he returned, as to the delivery of the telegram to the defendants, and what they said in reply; this is but hearsay.—*Moore & Co. v. Robinson*, 537.
 13. *Judgment*; *what not evidence of*.—The record of a judgment recovered against the grantor, after his execution of a deed to another, is not evidence as to such grantee, to show an indebtedness prior to its rendition.—*Donley v. McKiernan*, 34.
 14. *Laws of sister State*; *how proved*.—Under our statute (Code of 1876, § 3045), a certified transcript of the statutes of a sister State, as deposited in the office of the Secretary of this State, or the printed volume, purporting on its face to be issued by authority of such sister State, is sufficient to prove the existence of such statutes. The unwritten law, or the judicial decisions of such State, may be proved by the production of the reports of adjudged cases which are recognized in the particular State.—*Cubbege, Hazelhurst & Co. v. Napier*, 518.
 15. *Entries*; *what not admissible evidence of a nolle pros*.—An entry on the docket of the presiding judge, not shown to be in his own hand-writing, is not admissible evidence to show that an indictment had been *nolle pros'd*, and the defendant held to answer, &c.; such entry is, in no sense, a record, though it would furnish sufficient basis for making a record of the proceedings.—*Smith v. The State*, 29.

II. PRIMARY AND SECONDARY.

16. *Board of Revenue of Montgomery*; *what best evidence of proceedings of*.—The "Board of Revenue of Montgomery," is an inferior jurisdiction, required by statute to keep a record of its proceedings, and to appoint a clerk, who is keeper of its records. It has authority to hire out convicts sentenced to hard labor; and where a person deduces his authority to the custody of a convict from a contract with the Board, a transcript from its records, duly certified by the clerk, is the best mode of proving the exercise of its power.—*Taylor v. The State*, 164.

III. BURDEN AND WEIGHT OF PROOF.

17. *Foreign law*; *how must be pleaded and proved*.—Where a party rests his

EVIDENCE—Continued.

right to relief, or his defense, on the statutes of a sister State, the statute must be substantially pleaded; a general averment of the existence of the statute, and that it confers the right, or authorizes the defense, is insufficient, being the statement of the conclusions of the pleader, rather than an averment of facts.—*Cubbege, Hazelhurst & Co. v. Napier*, 518.

18. *Payment; who must prove.*—A party relying on or pleading payment, must prove it. It is a defense peculiarly within his knowledge, and, though his adversary, in pleading, may negative it, the negative averment is taken as true until he disproves it.—*Wolffe v. Nall*, 24.

IV. JUDICIAL KNOWLEDGE.

19. *Railroad; ownership of trains running on.*—Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road.—*S. & N. A. R. R. Co. v. Pilgreen*, 305.
20. *Judicial notice; of what not taken.*—Courts will not take judicial notice of laws of a sister State.—*Forsyth v. Preer, Ilges & Co.*, 443.

V. OBJECTIONS TO EVIDENCE.

21. *Objection to evidence.*—When a question is asked a witness, which is not objectionable in form, but only because it may elicit illegal evidence, the injury is not in allowing the question to be asked; and if illegal evidence is contained in the reply, the objection should be made to the reply, and the exception directed against the admission of the answer.—*Eagle & Phoenix Mfg Co. v. Gibson*, 369.
22. *Same; what objection may properly be made on trial.*—Objections, on the ground of illegality or irrelevancy, may properly be made pending the trial of the cause.—*Scott v. Hodges*, 339.
23. *Objection to deposition; when comes too late.*—Motion to suppress part of a deposition comes too late after the trial has been entered upon, if based on the ground that the answers are not responsive to the questions; because, if such objections are sustained, the deposition may be retaken and the facts proved lawfully. Such objection should be made before the trial is commenced.—*Moore & Co. v. Robinson*, 53.

VI. PRESUMPTIONS. See ERROR AND APPEAL—CONVEYANCE.

VII. WITNESS, COMPETENCY OF. See WITNESS.

EXECUTION.

1. *Execution; purchaser at sale under; what acquires.*—The purchaser of property, real or personal, at execution sale, acquires no other or greater interest therein than was possessed by the execution debtor at the time of the sale.—*Lovelace v. Webb*, 271.
2. *Equity of redemption of lands; what purchaser of, at execution sale, acquires.* Prior to the Code of 1852, an equality of redemption in lands was not the subject of a levy and sale under execution at law; and, under the present statutes, the purchaser of such equity at execution sale acquires no greater interest than the debtor, and is subrogated to all the rights, and subject to all the disabilities of the judgment debtor.—*Id.*
3. *Execution; what sufficient application for issue of.*—An oral or verbal application to the clerk of the court in which a judgment has been rendered, to issue an *alias* or *pluries* execution for its satisfaction, is sufficient, if he does not then require a written demand.—*Steele v. Thompson*, 323.
4. *What not sufficient excuse for failure to issue of.*—Where such application is made by one claiming to be the assignee of the judgment, his agent or attorney, the clerk, if he deem it necessary for his own protection, may require evidence of the assignment, or of the authority of the person making the demand; failing to do so then, he cannot afterwards set up the failure to offer such proof, to relieve himself and sureties upon his official bond from liability for damages which the assignee sustained, from the failure to comply with the demand.—*Id.*

EXECUTORS AND ADMINISTRATORS.

1. *Declaration of insolvency; effect of.*—A declaration of insolvency of an estate by the Probate Court, upon an administrator's report of its insolvency, does not *ipso facto* terminate his authority; and if he continues to administer the estate afterwards, the creditors not having elected or the court appointed another in his stead, his acts are valid, and the sureties on his official bond remain bound, as much so as if the estate had not been declared insolvent.—*Clay v. Gurley*, 14.
2. *Heir; what not evidence against in proceeding to subject land descended to payment of ancestor's debt.*—There is no such privity between the personal representative and the heir, as renders a judgment against the former evidence against the latter, in a proceeding to subject lands descended to the payment of a debt of their ancestor.—*Lehman Bro's v. Bradley*, 31.
3. *Removal of administrator; what does not justify.*—The fact that the interest of distributees conflict, and that the principal or residuary legatee stands in the attitude of adversary to pecuniary or demonstrative legatees, or to specific devisees, does not deprive the next of kin, or the residuary legatee, of priority of right to administration; and such antagonisms of themselves, in the absence of misconduct, cannot justify the removal of the administrator.—*Randle v. Carter*, 95.

See ESTATES OF DECEDENTS, 1, 2, 3—FRAUDULENT CONVEYANCES, 2.

EXEMPT PROPERTY.

1. *Exemption; how can not be defeated.*—When exempt property claimed as such, is sold under execution against the owner, who thereon obtains judgment against the sheriff, and those indemnifying him for a conversion, the defendants can not set-off against it, under the provisions of section 2993 of the Code, a judgment in their favor in the same court, against the owner of such exempt property; for if this were allowed, a creditor without right to subject such exempt property could do so in fact, and devote the proceeds of the sale to the payment of the debt, overruling the constitution and statutes, and escaping liability therefor, by the machinery of a set-off.—*Ex parte Hunt & Tally*, 1.
2. *Exemption to widow; what she may claim as.*—Under the act of April 23, 1873, regarding exemptions, the widow, upon the death of the husband, has the same unqualified right which he had to select, in addition to the property specifically exempt, any other property, so long as it does not exceed one thousand dollars in value; and she may select money on hand at the husband's death, or choses in action due him, and when thus selected, the personal representative must turn such property over to her.—*Darden, Adm'r, v. Reese*, 34.
3. *Same; what does not diminish.*—It is now settled that the exemptions which this statute allows the widow from her husband's estate, are not to be diminished, because she owns a statutory separate estate.—*Ib.*
4. *Same; what order to sell lands claimed should contain.*—When the debtor claims as a homestead more than he is entitled to, the court should compel him to select the amount he is entitled to claim, and order a sale of the balance, and an order to sell the whole tract, except the homestead of the proper amount, without specifying what lands shall constitute such homestead, is erroneous.—*Hardy v. Sulzbacher & Bro.* 44.
5. *Exemptions; what affidavit claiming should show.*—As the right of exemption is governed by the law in force when the debt was contracted, a claim of exemption, under the constitution of 1868, against process issued on a judgment rendered since then, on a debt which may have been contracted before the adoption of that constitution, should state with certainty when the debt was contracted, that the court may determine whether the debtor is entitled to the exemption claimed.—*Randolph v. Little*, 397.
6. *Homestead; exemption of, as to debts contracted in 1866.*—The act of April 23, 1873, repealed all prior exemption laws as to debts contracted prior to the constitution of 1868, and the result was there was no law of force

EXEMPT PROPERTY—*Continued.*

in April, 1875, which allowed the heads of families any exemption of a homestead, as to a debt contracted prior to the adoption of the constitution of 1868.—*Junkins v. Lovelace*, 271.

7. *Homestead; what valid mortgage of.*—Prior to the enactment of a statute, prescribing any particular mode in which the wife's concurrence in a mortgage of the homestead should be expressed, if a wife joined with her husband in executing the conveyance, and it was acknowledged before and certified by a proper officer, the constitutional requisition of the voluntary signature and assent of the wife was satisfied.—*Forsyth et al. v. Preer, Ingles & Co.* 443.
8. *Entry of, from United States; what insufficient to secure title.*—Under the revised statutes of the United States, (§ 2289, Ed. 1875,) title to land entered at a reduced rate for a homestead, cannot vest until final certificate, after proof of occupation for the prescribed period, and non-alienation during that time. One who merely entered lands and paid entrance fees for a homestead, without residing thereon or cultivating it for the period prescribed, and during that time alienated it, could not acquire any title.—*Lindsey v. Veasy*, 421.
9. *Exemption of homestead; amount of in 1871.*—There was no law of force applicable to homestead exemptions against debts contracted in 1871, except the constitution of 1868, which exempted eighty acres as a homestead, and no more.—*Hardy v. Sulzbacher & Bro.* 44.

FACTOR. See PAYMENT, 2.

FRAUD AND FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyance; jurisdiction of equity to relieve against.*—A court of equity has original jurisdiction to relieve against conveyances obtained by fraud, or undue influence; and it is no objection that, in the particular case, there may be a concurrent remedy at law.—*Waddelell, Adm'r, v. Lanier*, 347.
2. *Same; right of administrator to assail.*—The administrator has such a right in the lands of his intestate, as will enable him to maintain a bill in equity for the cancellation of a conveyance of the lands obtained by fraud, the heirs being made parties.—*Ib.*
3. *Conveyance; what presumptively fraudulent.*—Where the grantor and grantee sustain relations of trust and confidence, such as principal and agent and the like, any transaction between them will be narrowly watched and closely scrutinized by a court of equity, and relief will be granted against contracts entered into between them, unless the party claiming the benefit of the contract shows by clear and convincing proof that he acted with perfect good faith, and did not abuse or betray the confidence reposed in him; and where the donee is of superior mental capacity, or the donor of weak or feeble intellect, the presumption of fraud will require stronger evidence to remove it.—*Ib.*
4. *Conveyance; what fraudulent.*—In this case the court holds that the following facts justify a decree of cancellation: In 1867, the husband of intestate decedent died to her his entire estate, real and personal, and died in 1870. They had no lineal descendants. Twelve days after his death, she executed to Lanier an unqualified power of attorney to transact her business, discharging at the same time a person who had acted as agent for her husband in his lifetime, and for her up to that time. The appellee, Lanier, was indebted to her husband in his lifetime and the indebtedness was transferred to her. The intestate of appellant was near ninety years of age, partially paralyzed, her mind enfeebled and her body diseased. Shortly after the execution of the power of attorney, Lanier removed her to his house, and he and his family paid great attention to her. While sustaining these relations, a deed is executed which conveys to Lanier all the property of intestate, upon a purely voluntary consideration. This deed is prepared by an attorney, at the request of Lanier, who at the same time directs the preparation of an obligation to support intestate during her life; but it is not shown whether this obligation was ever executed or not. STONE, J., dissented.—*Ib.*

FRAUD AND FRAUDULENT CONVEYANCES—*Continued.*

5. *Deeds; what fraudulent and void as to existing creditors.*—A mortgage by a father to his son, to secure a promissory note, contained the following clause: "If I fail to pay or cause to be paid said note, with interest from date, then, after my death and the death of my wife, Mary Robbins, and not till then, the said Solomon Robbins, Jr., (the son,) is authorized to seize and sell," &c. Subsequently the father and his wife make a deed of the same lands to their daughter and her husband, which recites that its consideration is, "First, that the said Kate Grayson (the daughter) and her said husband are to pay, discharge and satisfy, on or before the same becomes due and payable, a certain debt to my son . . . particularly described in a mortgage deed executed by me to my son to secure the payment thereof, which mortgage deed was executed by me about the 5th day of November, 1867. . . . Second, that the said Kate Grayson and her said husband, also, to pay to me or my order, or for my use and benefit during my life, or to my legal representatives after my death, the balance remaining due of said sum of two thousand dollars, purchase-money, after deducting the sum by them paid and expended for the satisfaction of said mortgage debt due to my son. Fourth, that the said Kate Grayson and husband are to suffer me and my said wife, mother of said Kate, to reside with them, as they are now doing, upon said premises, or elsewhere, as may be agreed upon by the parties, for and during the natural life of myself and my said wife, or either of us; and the said Kate Grayson and her said husband are to reside with me and my said wife, giving to us their society and sympathy, and contributing from the proceeds of said lands whatever our necessities, comforts and conveniences may reasonably require, during the life of myself and of my said wife." Grayson and wife were in possession of the premises under the deed. *Held:*

1. That where the deed to Grayson and wife was attacked for fraud, by a creditor of the grantor, the mortgage to the son was competent evidence to show fraud.

2. That both the mortgage to the son and the deed to the daughter and her husband were fraudulent and void as to existing creditors of the grantor, without regard to the intention with which they were executed, and can furnish no defense to an action of ejectment brought by a purchaser of the lands, under an execution sale, to enforce the payment of a debt arising prior to the execution of the deeds.—*Sandlin et al. v. Robbins*, 479.

6. *Conveyance; who can assail.*—To entitle a party to assail and avoid a conveyance, on the ground that it is fraudulent as to creditors, complainant must show, among other things, that he was a creditor of the grantor, at or before the making of the conveyance.—*Donley v. McKiernan*.

7. *Fraudulent conveyance; what creditor need not do, to assail.*—A creditor having a pledge for the payment of a debt, is not bound, if he assails as fraudulent a subsequent conveyance by the debtor to other creditors, or asserts that it is a general assignment, in the benefits of which he, and all other creditors, are entitled to participate, to offer to relinquish the pledge, or to bring it in as a contribution to a common fund, for the equal benefit of the fraudulent donee and himself, or that other just creditors shall share in it.—*Ala. Warehouse Co. v. Jones*, 550.

8. *Fraud; action for.*—To constitute a fraud, in case of a safe sold by an agent as burglar proof, which will authorize a recovery for the value of articles lost in the safe, there must be something more than the mere assertion that the safe was burglar proof; there must have been an assertion as a fact, of that which the seller knew to be false; or a reckless affirmation that the safe was burglar proof, when the seller did not know whether the assertion was true or false; or a knowledge on the part of the seller that the safe was not burglar proof, and a failure to communicate that knowledge, when the seller knew the purchaser was contracting for the safe as burglar proof, and the purchaser, trusting to

FRAUD AND FRAUDULENT CONVEYANCES—*Continued.*

these representations, must have been deceived by them.—*Herring, Furrell & Sherman v. Skaggs*, 181.

9. *Fraud; how may be shown.*—Where the false representation imputed to the vendor of a patent right to use a certain process of tanning, consists of the statement that leather tanned by the process was as durable as leather tanned with bark, its falsity may properly be shown by the evidence of persons who have tested the durability of leather tanned by it. *Nelson v. Wood*, 175.

FRAUDS, STATUTE OF.

1. *Code, § 2199 of, construed.*—Under our present statute (Code, § 2199,) and since the Code of 1852, a trust in lands, not arising by implication or construction of law, can not be established by parol; but must be created by instrument in writing.—*Patton v. Beecher*, 579.
2. *Same.*—An express trust, that a grantee of lands, conveyed by deed absolute, expressing on its face a pecuniary consideration, shall hold for the use of the grantor and reconvey to her on request, can not be created by parol; and in the absence of clear evidence of fraud, imposition or mistake, at the time of the execution of the conveyance, the grantee's repudiation of the verbal promise to hold for the use of the grantor, and to reconvey, is not a fraud against which a court of equity can relieve. *Ib.*
3. *Contract; what does not forbid rescision of.*—A vendee imposed on by the fraud of a vendor, may repudiate the contract of purchase, upon its discovery, and recover back the consideration paid; and the fact that the contract of sale is in writing, will not prevent the admission of parol evidence of the fraud or misrepresentation.—*Nelson v. Wood*, 475.

GARNISHMENT.

1. *Code of 1876; § 3302 construed.*—Under section 3302 of the Code of 1876, the plaintiff in a garnishment suit has the right to contest with a transferee of the judgment debtor, the right to the money sought to be garnished; and when proper proceedings to this end are taken by the garnishing creditor, the garnishee must hold the money until such contest is decided, and any subsequent disposition of it, by him, is at his peril. *Saller, Levin & Co. v. Insurance Co.*, 221.
2. *Garnishment; what judgment proper in.*—Where the garnishing creditor has taken proper steps to contest with a transferee of the judgment debtor, the right to the fund sought to be subjected to garnishment, and the transferee, after proper notice, fails to appear and propound his claim, judgment should be rendered against the garnishee for the amount admitted in his answer.—*Ib.*
3. *Garnishment; claimant in, how must establish claim.*—The claimant of a debt sought to be subjected by garnishment, can not take advantage of irregularities in the process, or avail himself of the rights of others, with which he does not connect himself, though paramount to the claim of the garnishing creditor; but must rely on the strength of his own claim, the burden of establishing it resting on him.—*Clark & Coleman v. Few*, 243.
4. *Garnishment; what garnishing creditor may show.*—Where the claimant of the fund is entitled only to the individual property of the debtor, the garnishing creditor may show, by parol, that although the debt is evidenced by judgment against the garnishee in favor of the debtor individually, the debt was in fact the property of a partnership, and held by the defendant in trust.—*Ib.*
5. *Garnishment; main enquiry in.*—In garnishment suits, the main enquiry is whether the garnishee is indebted to the debtor in such form as that the debt can be condemned to the satisfaction of the plaintiff's judgment; if there be an indebtedness liable to condemnation, there should be a judgment in favor of the judgment or attaching creditor against the garnishee; if there be no indebtedness, or such indebtedness as can

GARNISHMENT—Continued.

- not be condemned, judgment should be rendered discharging the garnishee.—*Randolph v. Little*, 396.
6. *Garnishment; exemption as to debt sought to be subjected; when lost.*—A claim or demand sought to be subjected by garnishment, may be the subject of a valid claim of exemption by the judgment debtor; but if he delays to assert it until after judgment in favor of the attaching or garnishing creditor against the garnishee, the exemption is lost and can not afterwards be asserted. (Overruling *Webb v. Edwards*, 46 Ala. 16.) *Ib.*
 7. *Order; what void.*—After judgment in favor of the garnishing creditor against the garnishee, the court has no authority to entertain the original debtor's claim of exemption, and direct the sheriff to pay over the money collected on the judgment to him; such an order is void.—*Ib.*
 8. *Garnishment; what judgment in, irregular.*—A judgment against the garnishee for the amount of the original recovery against the judgment debtor, and also for "all costs of the original proceedings," &c., is informal, in that it does not set forth *in numero*, in the judgment of condemnation, the amount of such costs, and fails to give the garnishee authoritative evidence of the amount of credit he is entitled to claim of the judgment debtor. This, however, is but a clerical error, which will be corrected on motion in the court below, or in this court if the record furnishes sufficient data.—*Ib.*
 9. *Same; what judgment not informal.*—The judgment in the garnishment, however, is not informal, because it fails to set forth *in numero* the amount of costs adjudged in that proceeding. The costs are not taxed until after the judgment is rendered, and the garnishee is not entitled, as of course, to credit for all the costs of the proceedings; for they may have been increased or incurred by his own fault, in which event he can not claim credit as to such costs.—*Ib.*
 10. *Garnishment; when title of transferee of negotiable paper sought to be subjected, superior to lien of.*—Where the debt sought to be garnished is evidenced by negotiable paper, payable to the order of the makers, and by them endorsed in blank, which, at the time of the service of the garnishment, is in the hands of the judgment debtor, a transfer of such paper by the judgment debtor after the service of the writ to a third party, if made upon a valuable consideration, and without notice, before the maturity of the paper, clothes the transferee with a title superior to any right of the plaintiffs acquired by the issuance of the writ; the doctrine of *lis pendens* has no application to such a case.—*Mayberry & Co. v. Morris*, 113.

GUARDIAN AND WARD.

1. *Guardian; power of, over choses in action belonging to ward.*—A guardian has the same power as an executor, with respect to choses in action coming into his hands for administration, and may, if circumstances render it proper, to save the ward from loss, accept property, real or personal, in payment of a judgment in his favor; and those acting with him in good faith in that respect, are discharged as fully as if payment had been made in money, though if the propriety of the guardian's action is questioned, the burden rests on the guardian to show the existence of the circumstances which vindicate his conduct.—*Mason v. Buchanan*, 110.
2. *Credit; what improperly allowed.*—When a guardian having two judgments in favor of his wards, against the same person, accepts a conveyance of lands, of value less than the amount of the two judgments, from such person as payment to the extent of the consideration expressed in the deed, it is error to allow the guardian full credit for the amount on one of the judgments only, in the absence of proof showing that the conveyance was accepted solely in satisfaction of such judgment.—*Ib.*
3. *Guardian; for what not chargeable.*—In this case, the court reaffirms, and declines to depart from the rule declared in numerous decisions, that

GUARDIAN AND WARD—*Continued.*

an executor, or administrator, or guardian (not a mere agent or attorney), who, in good faith and in the exercise of reasonable diligence, during the war, in the regular administration of the trust, received, in satisfaction of debts due him in his representative capacity, Confederate treasury notes, while they were the circulating medium and generally received in payment of debts and in the transaction of business, is not chargeable, because the results of the war rendered them worthless. *Anderson v. Wynne*, 329.

HABEAS CORPUS.

1. *Habeas corpus, statutes concerning construed.*—Our statutes regulating the writ of *habeas corpus*, are not to be regarded as taking away the common law jurisdiction of courts to employ the writ to bring before them the body of a person illegally imprisoned; and where the imprisonment is under legal process, or judgment of an inferior court, to award a writ of *certiorari* removing the record; and when the writ is thus issued the proceeding is in its nature appellate, and there may be any inquiry into the regularity of the process, judgment or sentence.—*Kirby v. The State*, 51.
2. *Same.*—When, however, the writ is sued out under the statutes, before a single magistrate upon whom they confer the jurisdiction to be exercised in vacation, the proceeding is not in its nature appellate, but rather original; and the process or sentence being drawn in question collaterally, *illegality* only, and not error or irregularity can be inquired into, and illegality not being shown, the prisoner can not be discharged, however gross the error or irregularity.—*Ib.*
3. *Illegal imprisonment; what is.*—Where the prisoner is sentenced to hard labor for the county, a reasonable length of time, depending upon the circumstances of the particular case, must be allowed for his delivery to the proper authority, whose duty it is to carry out the sentence; and during this interval of time, it is the duty of the sheriff to confine the prisoner in the county jail. If, after such reasonable time, the sheriff still detains the prisoner in the county jail, the imprisonment, though lawful in its inception, becomes illegal, and the sheriff, ceasing to be the person authorized by law to detain the convict, he may be discharged on *habeas corpus*.—*Ib.*
4. *Same.*—Prisoner was indicted for grand larceny, and the jury, by their verdict, found him guilty of *petit* larceny, though they assessed the value of the articles stolen at a sum, the felonious taking of which constitutes grand larceny, and assessed a fine. The court, however, passed sentence on the verdict, sentencing the prisoner to hard labor for the county, at its August term, 1878. The commissioners court failed to establish any system of hard labor, and the sheriff still held the defendant in custody; when, on the 27th day of December, 1878, the prisoner made application, in vacation, to a circuit judge for *habeas corpus*, who refused to discharge the convict, and remanded him to the custody of the sheriff. *Held*:
 1. On such an application, inquiry could not be made whether the findings were consistent, or whether the circuit court should have passed sentence on the verdict.
 2. The delays between the sentence and the delivery of a prisoner to the proper authorities, to be put to hard labor for the county, was unreasonable; and the sheriff had no authority to detain him under the sentence.
 3. There being no authority to substitute imprisonment in jail for the sentence to hard labor, and the commissioners court having failed, for an unreasonable time after sentence, to establish a system of hard labor, the convict was entitled to his discharge.—*Ib.*
5. *Habeas corpus; when lies to obtain discharge on conviction for violation of municipal by-law.*—The authorities of a town incorporated under the provisions of the Code, (Chap. I, Title 14, Part 1, Code of 1876,) have no authority, upon conviction for breach of their by-laws and ordinan-

HABEAS CORPUS—Continued.

- ces, to punish the offender by imprisonment, except in cases of a "breach of the peace or disorderly conduct;" in other cases, the punishment must be a fine, and upon default of payment, the offender may be sentenced to "hard labor on the streets of the town, for a period not exceeding thirty days;" and a sentence upon conviction of a breach of a by-law or ordinance of such town, (other than those relating to breaches of the peace or disorderly conduct,) or a warrant or *mittimus* based on such sentence, which directs the marshal to take the offender "in custody and detain him until fine and costs are fully paid," is without warrant of law, in that it inflicts "imprisonment," when the charter provides "hard labor," and is also indefinite in duration, whereas the law limits it to a period not exceeding thirty days.—*Ex parte Moore*, 471.
6. *Habeas corpus; when should be granted.*—One detained under such sentence, or a *mittimus* based on it, is entitled to a discharge on *habeas corpus*.—*Ib.*
 7. *Habeas corpus; what not proper remedy for.*—*Habeas corpus* will not lie to correct errors or irregularities in the judgments of courts. The judgment must be void, not merely voidable; it must be a usurpation or excess of jurisdiction to entitle the prisoner to the writ.—*Ex parte Simmons*, 416.
 8. *Sentence; what irregular, but not void.*—Although under section 4450 of the Code of 1876, a sentence on conviction for burglary, to hard labor for the county for a period exceeding two years is irregular, and would be reversed on appeal or writ of error, it is not void or a nullity, and does not entitle the prisoner to a discharge on *habeas corpus*.—*Ib.*

HOMESTEAD. See EXEMPT PROPERTY.

HUSBAND AND WIFE.

1. *Equitable separate estate; what creates.*—A deed to a wife which conveys property directly to her, for her "sole and proper use, benefit and behoof," creates in her an equitable separate estate, which she may bind by her contracts, or alien in any manner she sees fit.—*Miller v. Voss, Taylor & Co.*, 122.
2. *Personally belonging to wife; what not pass title to.*—A sale of personalty of the statutory estate of the wife by her and her husband, the instrument not being attested by any witness or acknowledged, will not pass her title in the thing sold.—*Keiser v. Baldwin*, 526.
3. *Statutory separate estate; validity of mortgage of.*—A married woman can not make a valid mortgage of her statutory separate estate to secure a debt of any description.—*Gans v. Williams*, 41.
4. *Same; what part of.*—The natural increase of domestic animals, forming part of the *corpus* of the statutory separate estate of a married woman, is the property of the wife; and a mortgage of the progeny made by husband and wife, passes no title to the mortgagee, and will not defeat detinue by the wife for its recovery.—*Ib.*
5. *Statutory separate estate; what conveyance of, inoperative.*—The statutory separate estate of the wife may be sold by the husband and wife jointly, in the mode prescribed by the statute; but neither one nor both can pledge or mortgage it. The only power conferred by law is to sell, and this power is strictly and narrowly enabling.—*Shulman, Goetter & Weil v. Fitzpatrick*, 571.
6. *Same; incidents of husband's trusteeship of.*—The husband must apply the income of the wife's property to the maintenance of the family, and if he fails in this duty he may be removed from the trusteeship, and in such case the wife will have the same control over her estate, and the rents, issues and profits thereof, as if she were a *femme sole*; and her power of disposition is akin to, and as great as that which she could have in a court of equity over her equitable separate estate, and she may pledge or mortgage it.
7. *Husband; removal of from trusteeship.*—Where a decree on a bill filed by

HUSBAND AND WIFE—*Continued.*

the wife against the husband—alleging the receipt of the *corpus* of her statutory separate estate, and praying that he be decreed to have no further control over her estate, and that she may be invested with the rights of a *femme sole* as to such property—declares her entitled to the relief prayed, ascertains the amount due the wife, and directs the issuance of execution against the husband for the amount thus ascertained, and is silent as to whether the husband is removed or not, such decree does not remove the husband from his trusteeship or clothe the wife with the rights of a *femme sole* as to her separate property.—*Ib.*

8. *Statutory separate estate of wife; mode of enforcing liability of, for necessities.* The liability of the statutory estate of the wife for necessities, is the creature of statutes, which provide not only its extent, but the mode of its enforcement, and they authorize a sale of the wife's estate only after personal notice to the wife, as provided in the statute.—*Carly v. Blue*, 77.
9. *Same; jurisdiction to order sale of, how acquired.*—The jurisdiction of the court to order such sale, though the proceeding has many of the characteristics of a proceeding *in rem*, is acquired by personal notice to the wife, and not by the seizure of her estate; and a levy of attachment on her estate is not notice to her, either actual or constructive, in the mode provided by statute.—*Ib.*
10. *Same; what judgment does not authorize sale of.*—A judgment rendered by default, without personal notice to the wife, on a levy of an attachment on her statutory estate, is void as to her, so far as it condemns her statutory estate, and a purchaser at the sale under it acquires no title, and can not maintain ejectment.—*Ib.*
11. *Statutory separate estate; what within husband's power of investment.*—A purchase of land by husband and wife, the latter having a statutory separate estate, in the name and for the use of the wife, is not without the scope of the husband's power of investment over such estate; and if the purchase money be not paid, the vendor has a lien, which may be enforced by a sale of such lands; and the wife is not entitled to be first reimbursed out of the proceeds, the monies of her statutory separate estate used in making part payment of the purchase money.—*Norman v. Harrington*, 107.
12. *Code of 1876, § 3440 construed.*—Under section 3440 of the Code of 1876, the husband of a married woman may contract for the erection or repair of buildings situated on lands forming part of her separate estate, and the lien of a mechanic or material man for work done or material furnished in the erection of such building, attaches to the property, without the participation of the wife in the making of the contract.—*Ex parte Schmidt & Smith*, 252.
13. *Judgment; what proper in such a case.*—Where the plea only puts in issue the right of the husband to make the contract under which the work is done, and material furnished, and the jury find a general verdict for the plaintiff, the court should enter judgment declaring a lien and providing for its enforcement.—*Ib.*
14. *Equitable separate estate; what necessary to create.*—In order to create an equitable separate estate in a married woman, though no particular form of words is necessary, it must appear from the instrument and all the circumstances disclosed in it, that there is a clear and plain intention that the marital rights of the husband shall not attach, and that the wife should hold and enjoy, free and independent of them.—*Hooks v. Brown*, 258.
15. *Separate estates of married women; statutes concerning, to what relate.*—The statutes concerning the separate estates of married women do not refer to or affect separate estates created by contract, gift, or conveyance for their use, and operate only on estates made separate by operation of law, not limited expressly to the separate use of the wife.—*Ib.*
16. *Equitable separate estate; what devise creates.*—A devise to the wife for life, with remainder on her death to her children, born of her marriage with her then husband, and which vests the legal title in the husband as trus

HUSBAND AND WIFE—*Continued.*

- tee, declaring that the property devised shall not be subject to his debts, directing him to appropriate the rents, profits, and interest, *for the use and benefit of his wife and children*, and clothing him with power to sell and convey the lands, whenever he may think it to the advantage and best interest of his wife and children, and to reinvest the proceeds, creates in the wife an equitable separate estate.—*Ib.*
17. *Same; power of married woman to bind.*—Unless specially restrained by the instrument creating it, a *femme covert* may bind her equitable separate estate by any contract, to the same extent as if she were a *femme sole*, and a court of equity will subject the property to the satisfaction of any lawful contract she may make.—*Ib.*
18. *Statutory separate estate of wife; tenure and incidents of.*—Under our statutes the separate estate of the wife is her property and is not liable for the debts of the husband; it vests in the husband, with the right to manage and control and receive the rents, incomes and profits without accountability; but these rents and profits are not liable for his debts. Either husband or wife, by purchasing articles of comfort and support for the family, and for the tuition of the wife's children, suitable to their degree and condition in life, may make the corpus of the wife's estate liable therefor; but beyond this, neither husband or wife can make such estate liable for any debt.—*Lee et al. v. Tannenbaum*, 501.
19. *Statutory separate estate of wife; rents, incomes and profits of; how husband takes.*—The rents and profits of the wife's estate pass to the husband as trustee, and they are thus bestowed in confidence that he will use them for the support of the family; but this is only a moral duty, to the performance of which he cannot be compelled by any legal remedies, though he might be removed from the trust for a clear violation of this duty, in which event the wife would, as to such estate, be reinvested with all the rights of a *femme sole*.—*Ib.*
20. *Same; what proper application of.*—The payment by the husband out of the rents, incomes and profits of the wife's estate, derived from the cultivation of her plantation, of a debt for supplies, which were necessary and which had been used in the production of a crop, is not a breach of the duty resting on him to apply the proceeds of her estate to the support of the family.—*Ib.*
21. *Statutory estate of wife; for what liable.*—Where the husband has an account with a merchant, running through several years, some of the items of which render the estate of the wife liable for their payment, and others impose no liability on her estate, and the husband each year makes payments with the rents of her estate, directing the payments of each year to be applied to the account of the year in which they are made,—such payment extinguishes so much of the debt as was first incurred, without regard to the class of articles of which it was composed. If, of the balance remaining after such payments, any part is composed of articles for the support and maintenance of the family, the corpus of the wife's estate is liable for the amount of such necessities, and may be sold to enforce payment.—*Ib.*
22. *Wife's separate estate; what decree subjects.*—A decree of the Chancery Court, appropriating moneys, arising from a sale of lands of the separate estate of a married woman, under a former decree in the cause, which had been reversed, is a decree "subjecting to sale" the separate estate of a married woman, as much as if the court had ordered a sale of the lands themselves.—*Ware v. McDonald*, 81.
23. *Code of 1876, § 3930 construed.*—The fact that a married woman is "a free dealer," and authorized to contract as a *femme sole*, will not exclude her from the benefits of the statute (Code, § 3930,) authorizing married women to appeal from decrees or judgments subjecting their separate estates, without giving security for costs.—*Ib.*
24. *Witness; who incompetent.*—The husband of a woman, jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them on their trial for that offense.—*Cotton v. The State*, 12.

INJUNCTION. See TAXES.

INQUISITION OF LUNACY.

1. *Lunacy; inquisition of; what void.*—An inquisition of lunacy had without personal notice to the alleged *non compos* is void; and so also the appointment by the Probate Court of a guardian for said lunatic, and the proceedings had by such guardian for a sale of lands belonging to said lunatic.—*Molton v. Henderson*, 426.

INTEREST.

1. *Interest; when recoverable.*—Interest is not recoverable on a debt due by a citizen of one State to a citizen of another State, during the period their respective countries are at war, as all unlicensed intercourse between them is forbidden; but where the payee of a note and the sureties thereon are residents of the same country, they may lawfully make payment and stop interest; and they are liable accordingly in a suit against them, though, by reason of their principal being an alien enemy of the creditor, the latter could not recover interest of the principal in a direct suit against him.—*Bean, Adm'r, v. Chapman*, 58.
2. *Same.*—In such a case the law reduces the principal's liability, without the fault or procurement of the creditor; and the principal's defense against recovery for interest is a personal defense, not available to the surety, unless he also have a personal defense.—*Ib.*
3. *Interest; what law governs.*—Where interest is expressly or impliedly to be paid upon contracts, the law of the place where such contract is made, or the law of the place of performance, if such contracts are to be performed in a place other than that in which they are made regulates and controls the rate of interest.—*Cubbege, Hazelturst & Co. v. Napier*, 518.

JUDGMENT.

1. *Judgment; what questions conclusive of.*—Where complainant, being a corporation, without fraud or collusion, recovers a judgment against a debtor on its contract, the judgment determines the validity of the contract, and the question cannot be reopened, when the creditor gives into equity to reach and condemn equitable assets.—*Ala. Warehouse Co. v. Jones*, 550.

See ESTATES OF DECEDENTS, 6, 9; EXECUTORS AND ADMINISTRATORS, 1, 2; HUSBAND AND WIFE, 13; EVIDENCE, 13.

JURISDICTION.

1. *Jurisdiction of court; when open to inquiry.*—The jurisdiction of a court over the subject matter, is at all times open to inquiry, either on appeal or when the judgment rendered is collaterally assailed; and no consent, laches, or solicitation of the parties can cure such a defect.—*Whorton v. Morange*, 202.
2. *Settlements of executors; jurisdiction of probate court over.*—As to the settlement of the accounts of an executor, the jurisdiction of the court of probate is purely statutory, and in its exercise the court is regarded as an interior court of limited statutory, not of general jurisdiction.—*Ib.*
3. *Probate judge; incompetency of, manner in which duties of must be performed by register.*—When the Probate Judge is incompetent to act in any matter of administration, the statute provides that his duties shall be discharged by the Register in Chancery, who, upon proper certificate, &c., becomes as to such administration Probate Judge *pro hac vice*, and continues such while the disqualification of the judge continues, and thereon the jurisdiction of the Probate Judge ceases, and the register may appoint an administrator, or make other needful orders; but the record of his acts is kept in the Probate Court, the judge of which is the custodian of the record, and the proper officer to certify a transcript of such proceedings; the Register in Chancery as such has no authority to certify such proceedings.—*Bean v. Chapman*, 58.

LANDLORD AND TENANT.

1. *What not denying title of landlord.*—Defendants rented lands from plaintiffs for a year, entered into possession, and remained undisturbed, executing to the plaintiffs, individually, a note, stating that it was given for rent of certain described lands. *Held:*

Under plea denying plaintiffs' ownership of the note, the defendants might show, by parol, that the plaintiffs had been school trustees of a fractional township in which the lands, which were the sixteenth section school lands, were situated, and that before the renting, but unknown to the parties, who contracted under the common mistake that the plaintiffs were still school trustees, the legislature had incorporated the lands into another township, the trustees of which claimed the debt; that these facts defeated the plaintiff's right of action, and that defendant and plaintiff both acknowledging the township as landlord, defendants, in setting up the defense, were not denying or disputing the title of the landlord. (BRICKELL, C. J., dissenting.)—*Borland v. Boz*, 87.

LEGACY.

1. *Legacy; assent to by executor; how may be shown.*—The law does not require that the assent of the executor to a legacy be given in any particular form; it may be expressed in words, accompanied by a delivery of the thing bequeathed, or it may be implied from conduct consistent only with an intention to surrender to the legatee the title and control; and where the property devised is allowed by the executors to remain in the undisturbed possession of the legatee, who is also one of the executors, for thirteen years, the presumption of assent will be made. *Wharton v. Moragne*, 202.

See WILLS—CHANCERY.

LIEN. See ADVANCES, 1, 3; HUSBAND AND WIFE, 12, 13.

LIMITATION, STATUTE OF.

1. *What possession sufficient to support plea.*—An adverse possession, open, notorious, accompanied with acts of ownership, bars an action for the recovery of lands, without any reference to the *bona fides*, or color of title, under which the adverse holder claims ownership.—*Smith v. Roberts*, 83.
2. *What will not stop running of.*—When the defendant, or those whose title he has, had open, pronounced adverse possession, claiming ownership during the life-time of the true owner, his death would not arrest the running of the statute of limitations, although his heirs, the plaintiffs in this suit, were then infants.—*Ib.*
3. *When commences to run.*—Where the partnership affairs are unsettled on a dissolution, and one partner, by written agreement with the other, leaves the partnership assets with him to dispose of, whenever he can do so at a fair price, a continuing trust is thereby created, and the bar of the statute of limitations will not begin to run against the right to an account of the partnership dealings, so long as the parties to whom the assets were delivered act under the trust, or admit that it is still continuing.—*Causler v. Wharton*, 359.
4. *Same.*—In the absence of any evidence of any extrinsic fact, aiding in its construction, a writing by which the depository acknowledges to have received a certain number of dollars in gold "on deposit, to be paid" to the depositor "on demand," will be held not to be a contract of bailment, but a loan of money, payable presently or on demand; and the statute of limitations will commence to run against it, not from the date of the demand, but from the date of the writing.—*Wright v. Paine*, 340.
5. *Executor or administrator; what lapse of time necessary to constitute bar in favor of, against distributee.*—Under the decisions of this State, the lapse of twenty years, during which time there is no acknowledgment by the

LIMITATION, STATUTE OF—*Continued.*

personal representative of the existence of the trust, will constitute a bar to any proceedings, by a legatee or distributee, for a settlement of the estate; but this time is to be computed, not from the grant of letters, but from the period at which the personal representative could have been coerced to settlement.—*Greenlee v. Greenlee*, 335

6. *To whom does not apply.*—Suits against a personal representative to compel a settlement of his trust, are not within the terms or spirit of the statute of limitations, and there is no statutory bar to such proceedings; and the fact that his sureties on his bond are protected by a statutory limitation, cannot avail the personal representative, who is liable to those beneficially interested, independently of his bond.—*Ib.*
7. *What governs actions on case for injuries caused by erection of dam.*—The statute of limitations of one year (Code of 1876, § 3231) governs actions on the case for damage to riparian lands, caused by the diversion of the waters of a stream by the erection of a dam across such stream. *Eagle & Phoenix M'fg Co. v. Gibson*, 370.
8. *What within protection of.*—The possession of lands under a conveyance of a guardian, made in pursuance of a void decree of the Probate Court for their sale, is supported by color of title, and is adverse, protected by the statute of limitations.—*Molton v. Henderson*, 426.
9. *When begins to run.*—Where the legal title to lands resides in trustees, or a survivor of them, and such lands are sold by a guardian of the *cestui que trust*, under void proceedings, and the purchaser goes into possession, the statute of limitations begins to run from the date of such sale and possession under it, and is not suspended by the death of the trustees, after such possession accrued.—*Ib.*
10. *Cestui que trust; when barred.*—Where both the trustee and *cestui que trust* have been out of possession of lands, held adversely to them for the length of time necessary to perfect the bar of the statute of limitations, the *cestui que trust* will be barred, even though he was all the time under a disability, such as minority, coverture or insanity; and this principle applies as well to equitable as to legal interests of the *cestui que trust*.—*Ib.*
11. *To what applicable.*—A wider operation is given to the statute of limitations, when applied to adverse possessions, than when applied to contracts; the latter are not extinguished by it, but the remedies for their enforcement are barred, but, as to property, a possession protected by the statute ripens into a perfect indefeasible title.—*Ib.*
12. *State; when subject to.*—Where the State holds lands as a mere trustee, it is subject to the operation of the statute of limitations.—*Ib.*

MANDAMUS.

1. *When lies.*—Where the register in chancery refuses to make out and send up the transcript of the record in a chancery cause on appeal, application should be made to the chancellor, or to this court, for appropriate orders to have the transcript sent up; but a circuit judge has no authority to control the register in the discharge of his duties in reference to causes in the Chancery Court, and there is no necessity for a resort to *mandamus* in such case; and if the circuit judge grant the writ in such a case, this court, on appeal from the order allowing the *mandamus*, will reverse.—*Ware v. McDonald*, 81.
2. *When will not lie.*—*Mandamus* will not lie to correct errors in the final judgments or decrees of an inferior court; and where the injury sought to be redressed consists in the refusal of the lower court to enter proper judgment upon the verdict of a jury, the remedy is by appeal, and not by *mandamus*.—*Ex parte Schmidt & Smith*, 252.
3. *Appeal; when allowance of, compelled by mandamus.*—A party against whom a decree is rendered, is entitled to an appeal as matter of right; and where the appeal is denied, and its allowance is sought to be compelled by *mandamus*, the court, in determining the application, will not look to the probable result of the appeal.—*Ware v. McDonald*, 81.
4. *When will not lie.*—While the statute authorizing the garnishee to set up

MANDAMUS—*Continued.*

in his answer the claim of a third person, and providing the mode in which such claimant may contest with the plaintiff the right to the debt, contemplates that the claimant will appear at the term of the court to which he is cited, and then propound his claim, there is nothing in the terms or purposes of the statute which excludes the power of the court to enlarge the time of propounding the claim, or to continue the cause, with leave to propound the claim at a succeeding term. Whether or not this shall be done, must be left to the sound discretion of the court, and the exercise of that discretion will not be controlled by *mandamus*.—*Ex parte Opdyke, Terry & Steele*, 68.

MECHANIC'S LIEN. See HUSBAND AND WIFE, 12, 13.

MORTGAGE.

1. *Mortgage of chattels; payment of debt secured by; effect of.*—The payment of a debt secured by a mortgage of personal chattels, operates as a satisfaction of the mortgage and extinguishes the title conveyed by the mortgage.—*Shiver v. Johnson*, 37.
2. *Same.*—Where, in an action by the mortgagee against the mortgagor to recover the mortgaged property, it is shown that the note secured by the mortgage was given for money loaned at usurious interest, and the mortgagor has paid, or tendered to pay the principal, and brings the money into court, a charge that if the jury believe these facts, plaintiff was entitled to recover only the costs of the suit, contains no error prejudicial to the plaintiff, and furnishes no ground for a reversal on appeal by him.—*Id.*
3. *Mortgage; by what law governed.*—Where the mortgagor and mortgagee reside in Georgia, and all the transactions between them take place in that State, and the mortgage does not designate any particular place of payment, the law of that State determines the validity and operation of the contract, and such contract will be enforced so far, and only so far, as it is valid under the laws of that State, no matter where the enforcement is sought, unless it offends the positive law, or violate the public policy of the State in which enforcement is sought.—*Cubbege, Hazelhurst & Co. v. Napier*, 518.
4. *Mortgage; validity of.*—As between the parties to it, whatever might be its effect as to third persons, it is not essential to the validity of a mortgage taken to secure a pre-existing debt and future advances also, that it should express on its face that it is to operate not only as a security for a present debt, but also for advances; nor that the agreement that it should have such effect should be in writing.—*Forsyth v. Preer, Illges & Co.* 443.
5. *Note; what sufficient consideration for.*—Where a note is given for an aggregate sum, including not only a pre-existing debt, but the amount it was contemplated the mortgage would advance before the maturity of the note, there is not as to such future advances, or the sum intended to cover them, any want of consideration for the note, and a mortgage given for its security is a valid security for so much as the mortgagee advanced.—*Id.*
6. *Receiver; when should not be appointed.*—The purchaser at execution sale of the equity of redemption in mortgaged lands has no equity, upon seeking redemption from the mortgagee, to compel the application of personal property embraced in the same mortgage, to the payment of the mortgage debt to the exoneration of the land; and the appointment of a receiver to take charge of such personalty, upon bill filed by the purchaser to redeem the mortgaged lands, and an order for its sale and application of the proceeds to the mortgaged debt in ease of the land, are erroneous.—*Lovelace v. Webb*, 271.
7. *Mortgage to secure future advances; what embraces.*—A mortgage to secure future advances, which, on its face, gives notice as to the extent and purpose of the contract, will prevail over the claim of a purchaser at execution sale, under a levy made after its execution, although such

MORTGAGE—Continued.

- execution issues on a judgment recovered prior to the execution of the mortgage ; and it is not necessary for such mortgage to specify any particular or definite sum which it is to secure ; it is sufficient to show a contract that it is to stand as security to the mortgagee for such indebtedness as may arise from future transactions with the mortgagor.—*Id.*
8. *Advancements by mortgagee to tenants of mortgagor ; right to priority of satisfaction out of crop grown on rented premises.*—A mortgagee who advances to tenants of the mortgagor, and who receives the crops grown by such tenants, has the right to apply such crops to the payment of such advances, after paying the rent due, in priority to the debt secured by the mortgage.—*Id.*
 9. *Rent of mortgaged premises ; to whom belong.*—A mortgagor until the entry of the mortgagee, after condition broken, is entitled to the rents of the mortgaged premises, unless the mortgagee intercepts them by notice to the tenants ; and the purchasers of the equity of redemption are entitled to rents falling due after their purchase, subject to all equities then existing.—*Id.*
 10. *Mortgage ; what does not satisfy.*—Where the assignee of a mortgage and debt secured by it, extends the debt or takes new notes from the mortgagor, this does not extinguish the mortgage, or impair it as a security for the new notes, so far as they represent original indebtedness secured. *Kieser v. Baldwin*, 526.
 11. *Same.*—Where a conveyance by husband and wife of the statutory separate estate of the wife, in satisfaction of notes secured by a valid mortgage on her property, is not sufficient to pass title, because not witnessed as required by statute, and she repudiates it on that account, the mortgage and debt secured by it, are not extinguished, but remain unimpaired, though in pursuance of abortive sale, the notes and mortgage were surrendered to the mortgagors.—*Id.*
 12. *Mortgage ; what valid.*—Where the husband, or the wife, with his concurrence, purchases personal property, paying part in cash with money of her statutory estate, and they both execute, contemporaneously with, and as part of the sale, a mortgage on the property purchased, to secure notes for the balance of the price, the mortgage is valid, and neither the husband nor the wife can repudiate it.—*Id.*
 13. *Request to satisfy.*—Notice, or request, to each of the members of a partnership, who are mortgagees, is not necessary to render them jointly liable to the aggrieved party, for the statutory penalty for failure to enter satisfaction of a mortgage ; notice or request to one is notice or request to all.—*Renfro & Andrews v. Adams*, 302.
 14. *Mortgage ; statutory penalty for failure to enter satisfaction, what not essential to recovery of.*—It is not essential to the recovery of the statutory penalty for failure to enter satisfaction of a mortgage (Code, § 2223,) that the mortgagee's failure should have been wilful or intentional ; although not wilful or intentional if it resulted from mere inadvertence, inattention or indifference, the penalty is incurred.—*Id.*
 15. *Quere.*—Whether a physical or mental incapacity to comply with the request would not be a defense.—*Id.*

See HUSBAND AND WIFE.

MUNICIPAL CORPORATION.

1. *Highways in municipal corporations ; jurisdiction over.*—When a rural district is made the site of an incorporated town, exclusive jurisdiction and authority over the public roads and highways, theretofore existing within the corporate limits, pass to the corporate authorities.—*McCain v. The State*, 138.
2. *Same.*—It rests within the governmental discretion, confided to the corporate authorities, whether they will use or adopt such highways as streets ; they may do so, or may alter or even abolish them as streets, as the wants of the community may require ; and not having adopted

MUNICIPAL CORPORATION—*Continued.*

- such highway as a street, or having abolished it as such, they are not indictable for failing or refusing to keep it in repair.—*Ib.*
3. *Municipal corporation organized under Code; powers of.*—The authorities of a town incorporated under the provisions of the Code, (Chapter I, Title 14, Part 1, Code of 1876,) have no authority, upon conviction for breach of their by-laws and ordinances, to punish the offender by imprisonment, except in cases of a "breach of the peace or disorderly conduct;" in other cases, the punishment must be a fine, and upon default of payment, the offender may be sentenced to "hard labor on the streets of the town, for a period not exceeding thirty days."—*Ex parte Moore*, 471.
 4. *Same; what sentence illegal.*—A sentence upon conviction of a breach of a by-law or ordinance of such town, [other than those relating to breaches of the peace or disorderly conduct,] or a warrant or *mittimus* based on such sentence, which directs the marshal to take the offender "in custody and detain him until fine and costs are fully paid," is without warrant of law, in that it inflicts "imprisonment," when the charter provides "hard labor," and is also indefinite in duration, whereas the law limits it to a period not exceeding thirty days.—*Ib.*
 5. *Municipal corporation; what will not accomplish dissolution.*—The mere non-user of its powers by a municipal corporation, does not *ipso facto* work its dissolution. It will require a judicial sentence to effect its dissolution.—*Ib.*
 6. *Incorporation; what invalid.*—Where a town has been regularly incorporated by act of the legislature, which act is still in force, the Probate Judge is without authority, under the provisions of the Code, to grant a second charter; his powers in the premises are limited to towns not already incorporated. Towns cannot have at one and the same time two co-existing charters of incorporation.—*Ib.*
 7. *Same; legality of, how cannot be inquired into.*—The legality of charters of corporations cannot be assailed in a collateral proceeding. Neither can one colorably in office, and publicly exercising the functions of a municipal officer, be treated as a usurper, and resisted as such. He is an officer *de facto*, and must be submitted to, until displaced by a direct proceeding for that purpose.—*Ib.*

NATIONAL BANKS. See TAXATION.

NEGLIGENCE. See RAILROADS.

NOTICE. See MORTGAGES, 13.

OFFICER DE-FACTO. See MUNICIPAL CORPORATIONS, 7.

OFFICIAL BONDS.

1. *Tax collector; when not liable for paying money to treasurer who had not given bond.*—The act to keep in each county a proportionate share of the public school money, approved April 19, 1873, by its second section required the tax collector of each county to pay over, at the end of each month, to the county treasurer, all poll taxes collected during the month, taking the county treasurer's receipt, or duplicate, approved by the probate judge, &c., which shall be received as cash in his settlement with the Auditor. The same act, in another section, provided that, before any money should be paid to the county treasurer, he should increase his bond to such an amount as shall be authorized by the superintendent of public instruction.

The tax collector, as required by the second section of the act, paid over to the county treasurer, at the end of each month, the poll taxes collected during the month, taking the receipts prescribed by that section, without any knowledge that the treasurer had not increased his bond.

OFFICIAL BONDS—*Continued.*

Held: Although as between the treasurer and the sureties on his general bond, the latter were not liable for payment of poll taxes made to the treasurer before increasing his bond, as required by the act, yet the failure of the treasurer to give such increased bond, without more, did not, *proprio vigore*, vacate his office, and he still remained an officer *de jure*; and the statute not imposing upon the tax collector the duty of ascertaining whether such increased bond had been given, he had the right to presume that the authority charged with exacting such bond, had properly performed its duty, and in the absence of information to the contrary, was discharged by payments of poll taxes made in good faith to the county treasurer; though under the inconsistent provisions of the statute, the treasurer, as between himself, his general sureties and the State, could not rightfully receive payment of such taxes until he had given the increased bond.—*Woodall v. Oden*, 125.

2. *Bond; what does not invalidate.*—Where, because of an administration committed to the sheriff, his bond becomes insufficient surety, and the probate judge thereon notifies the commissioners' court, then in session, which required the sheriff to give an additional bond in a penalty larger than that of a former bond, the fact that the judge of probate took and approved an official bond, reciting the facts, without stating the penalty prescribed in said order, and fixed the penalty at a much greater sum than that required in the order, will not render the bond invalid.—*Burnett v. Nesmith*, 261.
3. *Bond; who may sue on.*—When an additional bond is required of and executed by a sheriff, any person aggrieved by his subsequent defaults is entitled to sue on either the original or additional bond.—*Ib.*
4. *Bond of co-executors; to whom sureties on, not liable.*—Two or more executors or administrators entering into a joint bond for the faithful performance of their duties, are liable for the acts and defaults of each other, unless the bond itself shows that they did not intend to become so bound, and they and each of them come under the obligation to hold their sureties harmless against loss by any default on the part of either of the principals; and though one or more of the executors dies, the bond remains a security for the performance of duty by the other, unless proper steps are taken to have the bond made inoperative for future defaults.—*Stevens v. Taylor*, 269.
5. *Tax collector's bond; character and extent of lien created by.*—The lien created by § 495 of the Revised Code, is not like that of an execution, a mere legislative remedy; but the bond of the tax collector being a contract by which the law had previously declared liens should be created, such lien is a lien by contract, so far as all parties to the bond are concerned. The lien operates as a mortgage in all respects, except that it confers no rights which can be enforced at law, and can be carried into effect, as a specific lien, only in a court of equity.—*Knighon v. Curry et al.* 404.

See EXECUTORS AND ADMINISTRATORS.

OVERRULED CASES, AND HEREIN OF CASES AFFIRMED AND CRITICISED.

1. *Case overruled.*—*Webb v. Edwards*, 46 Ala. 16, overruled. *Randolph v. Little*, 396.
2. *Case overruled.*—The case of *Bowen v. Blount*, 48 Ala. 670, overruled by *Miller v. Voss, Taylor & Co.*, 123.
3. *Case doubted.*—The court declines to follow the decision in *Lippincott v. Mitchell*, 4 Otto, 766.—*Ib.*
4. *Case criticised.*—The definition given in *Perrine v. Fireman's Ins. Co.*, 22 Ala. 576, of the term "means of satisfaction," is too narrow.—*Ib.*
5. *Cases commented on and criticised.*—The cases of *Kennedy v. Kennedy*, (2 Ala. 571,) and *Bishop v. Bishop*, (13 Ala. 475,) were decided prior to the present statute against the creation of parol trusts in lands; and the latter involved such a trust in personal property, which is not within

OVERRULED CASES, &c—*Continued.*

the prohibition of our own or the English statute of frauds. The case of *Barrell v. Hanrick*, (42 Ala. 60,) originated since the enactment of our present statute; but the court, without deciding how far it would feel bound to follow it, in a case similar in its facts, declares that "it can not be regarded as establishing the proposition, so broadly asserted, that the mere violation or repudiation of a parol promise or trust, offensive to the statute, is a fraud which will authorize a court of equity to relieve against the words of the statute."—*Patton v. Beecher*, 579.

6. *Case affirmed.*—The court reaffirms the rulings in *Mooney v. The State*, (33 Ala. 419,) as to when, and when not, drunkenness may afford defense against an indictment for assault with intent to murder.—*Ross v. The State*, 225.

PRINCIPAL AND AGENT.

1. *Agent; power of, to give warranty.*—A general agent to sell, without express authorization from his principal, may bind him by such express stipulations as are usual and customary in effecting the sale; and though in some cases—as the sale of a slave, &c., where the agent gave a warranty of soundness—the court will declare the extent of the agent's authority in this particular, as matter of law, the extent of the agent's authority to bind his principal by express stipulations, is, in general, a question for the determination of the jury, in view of what is usual and customary with reference to such sales.—*Herring, Furrell & Sherman v. Skaggs*, 180.
2. *Same.*—A general agent for the sale of Herring's Safes, has no authority, merely by virtue of his agency for their sale, to warrant them burglar proof; and whoever relies on such warranty, must show either express authority, or a custom to give such warranty, in making such sales, before the principal will be bound.—*Ib.*
3. *Principal; what act of, amounts to ratification of agent's acts.*—The receipt by the principal of the price of a safe which the agent sold, and without authority warranted to be burglar proof, will not amount to a ratification of the warranty, unless received or retained by the principal, with knowledge of the warranty.—*Ib.*
4. *Purchaser from agent; when does not acquire title against principal.*—Where the plaintiff authorized a person to ship cotton belonging to him, to the defendants in New York, and the testimony shows that he gave such person authority to ship in the plaintiff's name, and did not give authority to ship in any other person's name, such agent, by shipping the cotton in his own name, taking a bill of lading accordingly, cannot, by negotiating such bill of lading, charge the cotton with the payment of advances made on the faith of such bill of lading.—*Moore & Co. v. Robinson*, 537.

See FRAUD, 8.

PUBLIC LANDS.

1. *Sixteenth section lands; what necessary to fix title of, in the State.*—Under the act providing for the admission of Alabama into the Union, and the propositions therein contained, "that section number sixteen in every township, and where such section has been disposed of, other lands most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools," which were accepted by the people, no other act on the part of the State or general government was necessary to separate the sixteenth section from the balance of the public domain; and a survey by the government identifies and distinguishes it.—*Spragberry v. State, use, &c.*, 459.
2. *Lands granted in lieu of sixteenth section; what sufficient to vest title to, in the State.*—In order to invest the State with title to lands granted in lieu of sixteenth sections, legislation by Congress was necessary to select and identify such lands; and under the act of May 20, 1826, a mode of se-

PUBLIC LANDS—*Continued.*

lection was provided, which required that the secretary of the treasury select other appropriate lands within the district in which such townships were situated, and it was declared when such lands were selected, they should be held by the same tenure and upon the same terms as the 16th section. Under this act, a selection of lands by the receiver of public moneys, of the district where the lands are situate, communicated to the commissioner of public lands, which had by the latter officer been communicated to the secretary of the treasury in accordance with instructions for that purpose, and approved by the secretary, vests the title to the lands thus selected in the State.—*Ib.*

POWER OF SALE.

1. *What execution of, invalid.*—Where a power of sale, contained in a trust deed, requires notice to be given of the time and place of sale, such notice is a pre-requisite to the execution of the power, and a failure to give it renders the sale invalid.—*Wood v. Lake*, 489.
2. *Same; regularity of proceedings under, who must show.*—It is incumbent on one claiming under the execution of a power of sale contained in a trust deed, to show that all pre-requisites to a sale under such power were complied with; and the recitals of a deed made by the person clothed with the power, is not evidence of such compliance as against one not a party or privy to the deed.—*Ib.*

PARTNERSHIP.

1. *How may be created.*—In general, neither writing nor any other particular form is essential to the formation of a trading or laboring partnership, and, like other contracts, it may be implied from conduct and circumstances, if significant and expressive enough to convince the mind of the intent and assent of the parties to the formation of that relation.—*Causler v. Wharton*, 358.
2. *When equity will decree settlement of accounts of.*—It may be that, under the statute of frauds, a partnership for the purchase and sale of lands as a business is required to be in writing; but whether this be so or not, where partners, as an incident to their business, purchase and hold lands, and pay for them with partnership funds, equity will treat such lands as movable partnership property, whenever necessary for payment of debts, or the settlement of accounts between the partners.—*Ib.*

See MORTGAGE, 13.

PAYMENT.

1. *Who must prove.*—It devolves on a party pleading payment of a prior encumbrance in support of his right to a foreclosure of his junior encumbrance, to prove that such payment has been made.—*Ala. Gold Life Ins. Co. v. Sledge*, 566.
2. *Rule as to application of.*—While a factor, making advances and receiving payments from time to time, can claim the balance only as an existing debt, and payments are applied by him to the debts in the order of time in which they accrue, the rule is not inflexible; and if a different application of payments is shown, or is to be inferred from the course of dealing between the parties, then the rule does not apply.—*Ib.*

PENALTY. See MORTGAGE, 13, 14.

PLEADING AND PRACTICE.

I. COMPLAINT.

1. *Plaintiff; who is necessary.*—Where the legal interest in a cause of action, whether arising out of contract or *ex delicto*, is joint, residing in several persons, all who are living must join in an action founded on it. In such case, however, one or more of the parties may commence and

PLEADING AND PRACTICE—*Continued.*

- prosecute the action in the name of all, or bring them in by amendment, whether willing or not, upon indemnifying them against costs. *Harris v Swanson*, 299.
2. *Same*.—One of two joint mortgagors cannot maintain an action in his own name against the mortgagee to recover the statutory penalty for refusal to enter satisfaction, if his co-mortgagor is living; and when the action is commenced by one, an amendment joining the co-mortgagor as plaintiff should be allowed; and if the plaintiff offers indemnity to the co-mortgagor, with the sufficiency of which he is satisfied, the court cannot refuse the amendment, or exact other indemnity, because such mortgagor is unwilling, for personal reasons, to join in the suit.—*Ib.*
 3. *Same; test of liability to suit alone*.—The test of the wife's liability to suit alone is not the validity, but the nature and character of her title; if that devolves on her a statutory estate, as between her and her husband, she must be sued alone, though her title may be invalid or subordinate to the title of the plaintiff, and incapable of protecting the possession against the right of entry.—*Betts v. Mullen*, 365.

II. PLEAS.

4. *What insufficient*.—A., H. and S. jointly commit a trespass on lands forming the homestead of the former owner, at that time held by the widow by virtue of her dower and quarantine rights, and oust the widow, who brings an action for such trespass. Subsequently, she files a bill in chancery against H. and A. for dower and quarantine in said lands, and in such suit recovers judgment against them for about four thousand dollars. In consideration of three thousand dollars, the widow releases H. from all liability for the trespass, reserving in said release the right to enforce the balance of the decree against Armstrong, who pays it. *Held*: That these facts constitute no bar to her action for the trespass and ouster against S., when her complaint contains no claim for rents and profits of the land; and a plea setting up these facts in bar is bad on demurrer.—*Smith v. Gayle*, 446.
5. *What bad on demurrer*.—A plea by defendants which fails to aver authority in the shipper to ship, but avers "that the cotton was consigned to them, through their agent, as the property of one W. J. Carter," and "that they made an advance of one thousand dollars, and honored a draft of four hundred dollars, on the faith of the bill of lading and of said cotton, whereby they had a lien on said cotton which they had acquired *bona fide*," is bad on demurrer, when filed to a complaint alleging the ownership of the cotton to be in the plaintiff.—*Moore & Co. v. Robinson*, 538.

III. GENERAL PRACTICE.

6. *Amendment nunc pro tunc; what evidence necessary to support*.—After the expiration of the term at which judicial proceedings are had, an amendment *nunc pro tunc* of the minutes can only be made upon sufficient evidence from the records or dockets, or memoranda made under the authority of the judge presiding when they were made, showing that the proposed amendment should have been made then.—*Horton v. Beadle, Adm'r*, 32.
7. *Same; what evidence will not authorize*.—An amendment *nunc pro tunc* of a decree on settlement of an administration, so as to show the due appointment of a guardian *ad litem* for minors, and his acceptance in writing and acting for the minors, cannot be allowed, after the expiration of the term at which the settlement is had, when the only evidence adduced in support of the motion is that of the presiding judge, who does not testify positively as to any record of the appointment or written acceptance; and that of the administrator, who does not testify to the existence of the order of appointment or written acceptance thereof, or its

PLEADING AND PRACTICE—*Continued.*

- loss, but only that a person who appeared at the settlement was notified verbally by the judge, in the administrator's presence, that he was appointed guardian *ad litem*, and that such person appeared on the settlement and scrutinized the accounts. Such evidence does not prove the former existence or loss of any memoranda of record, showing the facts which it was proposed to insert in the amendment *nunc pro tunc*.—*Ib.*
8. *Amendment; what not a departure.*—A petition to require an executor to give bond, like other pleadings in civil causes, is amendable under our statute, at any time before final decree; and where the original petition averred an interest as a judgment creditor, an amendment describing the judgment, and averring also ownership by a transfer of a judgment against the executrix, is not a departure.—*Phillips v. Smith*, 575.
 9. *Evidence; what admissible under general averment of negligence.*—Under a general averment that "the injury complained of was the result of negligence or want of skill of defendant's employees in the management or running of the train," &c., evidence is admissible that defendant did not have on the train a sufficient number of brakemen and servants to control it.—*S. & N. A. R. Co. v. Thompson & Garner*, 495.
 10. *Charges; when may be refused.*—When a party requests charges which, though separately numbered, were not separately asked, and any of the charges thus asked are erroneous, the court is not required to distinguish between the good and the bad, but may refuse them all.—*Eagle & Phoenix M'fg Co. v. Gibson*, 370.
 11. *Indemnity; what sufficient.*—It is the duty of the court, when indemnity is demanded, to see that proper security is given, and to allow the party using the name of the others, time to give such indemnity; but when a party is satisfied with the indemnity offered, the duty of the court in this respect is ended, and it cannot exact other indemnity, or refuse to proceed with the cause until it is given, or refuse an amendment making such person a party until further indemnity is given.—*Harris v. Swanson & Bro.* 299.
 12. *Rules of practice; what proper.*—The Circuit Court may properly make a rule requiring written pleading in causes then pending for trial, to be filed with the clerk by the first day of the next term, and in all suits thereafter brought within the time prescribed by law for pleading, and in event of a failure thus to plead, that judgment by default or *nil dicat* should be rendered, on motion of plaintiffs, disregarding "pleas in short by consent," unless written consent be endorsed and filed with such pleas.—*Trammell v. Vane, Calvert & Co.*, 301.
 13. *Justices of the peace; appeals from judgment of; how tried in Circuit Court.* On appeal from the judgment of a justice of the peace in unlawful detainer, the statute requires the case to be tried anew, without any regard to any defect in the proceedings before the justice, and the Circuit Court should not enquire into the regularity of the proceedings before the justice.—*Reynolds v. Harris*, 415.
 14. *Verdict; what sufficient.*—A general verdict, finding all the issue in favor of the plaintiff in a statutory real action, where the complaint contains a substantial cause of action, and properly describes the premises sued for, is sufficient, and authorizes judgment, though the verdict does not describe the lands.—*Beitz v. Mullen*, 365.
 15. *Foreign law; how must be pleaded and proved.*—Where a party rests his right to relief, or his defense, on the statutes of a sister State, the statute must be substantially pleaded; a general averment of the existence of the statute, and that it confers the right or authorizes the defense is insufficient, being the statement of the conclusions of the pleader, rather than an averment of facts.—*Cubbege, Hazelhurst & Co. v. Napier*, 518.
 16. *Laws of sister State; how proved.*—Under our statute (Code of 1876, § 3045), a certified transcript of the statutes of a sister State, as deposited in the office of the Secretary of this State, or the printed volume purporting on its face to be issued by authority of such sister State, is sufficient to prove the existence of such statutes. The unwritten law, or the judicial decisions of such State, may be proved by the produc

PLEADING AND PRACTICE—*Continued.*

tion of the reports of adjudged cases, which are recognized in the particular State.—*Ib.*

RAILROADS.

1. *Railroad company; for what damage not responsible.*—A railroad company acquiring a right of way over lands, is not bound to plank or cover a culvert or drain, so as to prevent cattle from getting fastened therein; and is not responsible for the killing by its trains of cattle thus fastened, if it be shown that the company was duly diligent to prevent its trains injuring them.—*M. & C. R. R. Co. v. Lyon*, 71.
2. *Same; what negligence in.*—It is negligence in a railroad company to run its trains on a straight track, in the night time, at such a rate of speed that the train can not be stopped in the distance at which the engineer can see cattle, or other obstructions on the track, by the aid of the head-light.—*Ib.*
3. *Same; when negligence vel non, question for the jury.*—Where the distance to which the light was thrown by the head-light, which was in proper order and of the best kind in use, is not shown; but only that the engineer could not perceive by its light, at thirty yards distance, a young mule of the color of the earth about a culvert in which it was fastened, and could not stop in forty yards distance, and there is no evidence as to how much of the mule was above the track; it is error to charge the jury that it was negligence to run the train at a rate of speed at which the engineer could not stop before reaching the mule, after seeing it was on the track. Whether or not this was negligence was a question for the jury, in view of all the facts, under appropriate instructions from the court.—*Ib.*
4. *Evidence; what sufficient to justify recovery against railroad company.*—In an action to recover damages for injuries to live stock, inflicted by a train run on defendant's road, the plaintiff is not required to prove affirmatively that the train was controlled by defendant; in the absence of any evidence to the contrary, the jury is authorized to find the train was so run.—*S. & N. A. R. R. Co. v. Pilgreen*, 303.
5. *Railroad not highway, within meaning of § 4203 of Code of 1876.*—The track of a railroad company, used to carry on its business as a common carrier, is not a public highway, within the meaning of the statute against the use of vulgar and abusive language. To constitute such highway, there must be a road dedicated to, and kept up by the public, as distinguished from a private way.—*Comer v. State*, 320.
6. *Public crossing; statutory requirements as to duty of persons in charge of train.* The statute (§ 1699, Code of 1876,) exacts certain positive duties of those in charge of a train approaching a public crossing, or other place mentioned in the statute, rendering the railroad company liable for all damage to persons or property occasioned by the failure to observe these requirements, and imposing on it the burden of showing compliance with the statute, if the injury occurs at one of the places therein mentioned.—*S. & N. A. R. R. Co. v. Thompson & Garner*, 495.
7. *Same; what will not absolve from liability.*—The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employees neglected those precautions which ordinary prudence suggests as necessary to avoid casualties.—*Ib.*
8. *Duty of person approaching railroad crossing.*—A traveler approaching the intersection of a railroad with a public highway, is bound to look out and listen for engines and trains; and a neglect of this duty, essentially contributory to the injury, will defeat all right of recovery for it; but he is not bound to make inquiry as to the schedule or the time when trains are expected to pass.—*Ib.*
9. *Rate of speed; what charge as to, erroneous.*—A railroad train approaching a public crossing, must not only give the warnings and observe the other precautions required by statute, but its speed must be so slackened that the train may be more manageable in passing the crossing; and

RAILROADS—*Continued.*

hence, a charge that the company "had a right to run its train at any speed it pleased, so that it did not endanger freight or persons on board," asked in a suit to recover damages for injury to persons or property at a public crossing, is properly refused.—*Ib.*

10. *Railroad corporation; power of to borrow money to build its road, and secure same by mortgage.*—A railroad corporation, unless restrained by statute, has the implied power to borrow money to construct its road, and to secure the debt thus created by mortgage on its property.—*S. & M. R. Co. v. Lancaster*, 556.

RATIFICATION.

1. *Ratification; what does not amount to.*—Although ratification of unauthorized acts, given after knowledge brought home to the person for whom the act purports to have been done, will validate the act to the same extent as if it had been previously authorized, mere acquiescence can not be considered as ratification, and furnishes no ground for the doctrine of estoppel, unless such silence and acquiescence, after knowledge, forms the basis, or becomes the authority on which another, to the knowledge of the true owner, parts with value or incurs liability.—*Moore & Co. v. Robinson*, 537.

REHEARING.

1. *Common law certiorari; what proper judgment on.*—Where proceedings of the commissioners' court have been removed on common law writ of certiorari, to the circuit court, that court can only enquire whether enough affirmatively appears from the record sent up, to maintain the jurisdiction and decree of the lower court, and must affirm or quash the proceedings accordingly—the trial is not *de novo*.—*Ex parte Madison Turnpike Co.* 93.
2. *Rehearing under Code; to what does not apply.*—In such a case, what the record shows or does not show, can not be aided by extrinsic proof in the higher court; nor do the provisions of the Code, as to rehearing at law, (chap. 16, title 1, part 3, of Code,) apply to such trials on common law certiorari; and the circuit court, after the term in which its judgment is rendered in such case, is without authority or jurisdiction to alter it, or grant a rehearing.—*Ib.*

REGISTRATION.

1. *Trust deed; as to whom void.*—W. & B., on the 11th day of May, 1866, executed to H., as trustee, a deed of trust conveying certain lands to secure a debt partly for advances and partly created cotemporaneously with the execution of the mortgage. This deed was not recorded until the 7th of February, 1870. Under this deed the trustee sold the land to plaintiff in May, 1870, and made him a deed in December, 1870. At the spring term, 1867, F. recovered a judgment against W., as principal, and T. as surety. On the 14th November, 1867, T. paid the judgment, which was assigned to him. Execution on this judgment on the 18th of April, 1870, was levied on the lands in question, which were sold under it, on the 4th day of July, 1870, on which day the sheriff made a deed to W. as purchaser, who conveyed to defendant. *Held*—1. That the title of defendant W. was superior to that of plaintiff.—*Wood v. Lake*, 439.
2. *Registration; statute of, construed.*—The statute of registration, under the operation of which a junior conveyance may take precedence of a senior conveyance of the legal estate, saves the priority of the senior conveyance, if recorded within three months after its date, over a junior conveyance that may be earlier recorded, though the junior grantee may not have had notice of it, and has paid valuable consideration.—*Betz v. Mullen*, 365.

RECEIVER. See MORTGAGE, 6.

REGISTER. See MANDAMUS.

RESULTING TRUST. See TRUST AND TRUSTEE.

SHERIFF. See OFFICIAL BONDS, 2.

SCHOOL FUND. See OFFICIAL BONDS, 1.

SPECIAL TERM.

1. *Special term of Circuit Court; what order convening must show.*—It is not necessary that an order for holding a special term of court, should recite that the special term was necessary in the opinion of the presiding judge; his order for the special term is, in itself, an affirmation that the special term was necessary.—*Grant v. The State*, 233.
2. *Same; who may hold.*—A special term ordered by a judge of the circuit, may be held by a judge of another circuit.—*Ib.*
3. *Same; what sufficient to show authority for.*—The order for a special term, made by the judge in vacation, need not be entered upon the minutes until the court convenes; and a recital on its records that the special term was held at the place appointed by law, pursuant to an order made by the presiding judge, after notice given as required by law by advertisement in a named paper published in the county, for more than thirty days, sufficiently shows that the special term was called according to law.—*Ib.*

STATUTES, CONSTRUCTION OF, AND HEREIN OF THE CODE OF 1876.

1. *Penal laws; how construed.*—Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature; nor is the maxim to be so applied as to exclude from the operation of the statute, cases which the words in their ordinary acceptation, or in the sense in which the legislature obviously used them, would comprehend.—*Walton v. The State*, 197.
- § 369, Subdivision 7. Unconstitutional as to taxation on shares of national bank stock.—*Sumter Co. v. National Bank of Gainesville*, 464.
- § 419. To what taxes applies.—*Holding v. Thomas*, 4.
- § 595. Character and extent of lien declared by.—*Knighton v. Curry*, 404.
- § 596. Default, not its legal ascertainment, which authorizes withholding warrant.—*State ex rel. Moniac v. Brewer*, 215.
- § 1699. Construed.—*S. & N. A. R. R. Co. v. Thompson & Garner*, 495.
2199. Construed.—*Patton v. Beecher*, 579.
2218. What power not within.—*Mitchell v. Spence*, 450.
2223. What not essential to recovery under.—*Renfro & Andrews v. Adams*, 303.
2648. Duty of register under.—*Bean v. Chapman*, 65.
- 2711-12. Construed.—*Gaily v. Blue*, 77.
2892. When wife must be sued alone.—*Betz v. Mullin*, 365.
3045. What authorizes.—*Cubbege, Hazelhurst & Co. v. Napier*, 518.
3058. Competency of witness.—*Lemay, Ex'r. v. Walker*, 39.
3133. Construed.—*Ex parte Nelson & Kelly*, 376.
- 3218-19. What cannot be reached under.—*Mayberry & Co. v. Morris*, 116.
3440. Wife may make binding contract under.—*Ex parte Schmidt & Smith*, 252.
- § 3930. *Femme sole* not excluded from benefits of.—*Ware v. McDonald*, 81.
4203. What not highway.—*Comer v. The State*, 320.
4205. Construed.—*Weaton v. The State*, 197.
4205. What act within.—*Hill v. The State*, 168.
4208. Construed.—*Buckalew v. The State*, 334.
4450. What sentence does not authorize.—*Ex parte Simmons*, 416.
- § 4961. Construed.—*Kirby v. The State*, 55.

SURETY.

1. *Surety; what necessary to entitle to subrogation.*—Until a surety has paid

SURETY—*Continued.*

the debt of his principal, he cannot be entitled to contribution, but it is not necessary that the payment should have been in money; whatever discharges the principal from liability to the common creditor, and is accepted by him as a payment, will operate as such in payment by the surety.

See OFFICIAL BONDS, 1, 3.

STREETS AND HIGHWAYS. See MUNICIPAL CORPORATION, 1, 2; RAILROADS, 5-8.

TAXES.

1. *National banks; how far subject to State taxation.*—National banks are not subject to State taxation, except in so far as Congress authorizes it. *Sumter Co. v. Gainesville Nat. Bank*, 464.
2. *Same.*—Under the acts of Congress, national banks having their stock invested in United States bonds, are not subject to taxation on their capital stock, under State authority.—*Ib.*
3. *Assessment; what valid.*—An assessment upon the capital stock of a national bank, by an aggregate or gross assessment, is irregular and invalid.—*Ib.*
4. *Taxation by State; what subject to.*—Shares in such banks are subject to State taxation against the individual shareholders.—*Ib.*
5. *National bank; when required to pay tax assessed against shareholder.* When the State statute authorizes it, the banks may be compelled, by suit, to pay the taxes so assessed upon the shares.—*Ib.*
6. *Taxes on shares; how collected.*—In the absence of such legislation, such tax upon the shares is collectible of the shareholders, in the same manner as other taxes are collectible of individuals.—*Ib.*
7. *Shares of national banks; under what section of Code now assessed.*—Under the statutes of this State now in force, shares of the capital stock of such banks can be assessed only under subdivision 13 of section 362 of the Code.—*Ib.*
8. *Assessment; what illegal.*—An assessment upon the capital stock in the aggregate instead of against the shares, being irregular and invalid, and there being no valid act of the legislature requiring the bank to pay the tax against the shares when properly assessed, a county has no right of action against the bank for the refusal to pay the amount assessed against the capital stock.—*Ib.*
9. *Same; what assessment illegal.*—An assessment upon the shares in gross, or upon the capital stock of the bank, against the corporation, is not authorized by the act of Congress, and is illegal.—*National Com. Bank v. Mayor, &c.*, 285.
10. *Bank; when may be required to pay tax on shares of stock.*—A State may require a national bank to pay for its stockholders the taxes legally assessed against their respective shares.—*Ib.*
11. *National banks; how far subject to State taxation.*—National banks, or banking associations, being instrumentalities of the General Government, are not subject to control or taxation by the States, except in so far as Congress may expressly permit.—*Ib.*
12. *Same.*—Real estate owned by a national bank is taxable by State authority; and the separate shares of its capital stock, as personal property of the holder of such shares, may be taxed by the State or its municipal subdivisions, so long as the tax "is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and the shares owned by non-residents are taxed at the place where the bank is located.—*Ib.*
13. *Code of 1876; § 419 of, construed.*—Section 419 of the Code, which makes it the duty of a sheriff selling property under a levy, to ascertain what taxes are due upon the property, or by the owner thereof, and upon a sale, to pay the taxes found due to the tax collector of the county, &c., is not a remedial statute, and cannot be extended by construction, be-

TAXES—*Continued.*

- yond the plainly expressed intention of the Legislature.—*Holding v. Thomas*, 4.
14. *Same*.—The statute has no application to taxes due to, and collectible by a municipal corporation, but relates only to State and county taxes.—*Ib.*
 15. *Redemption of lands sold for taxes; how statutes authorizing are to be construed*.—The right to redeem lands sold for taxes is purely statutory; and while such statutes are favorably and liberally construed, courts can not change the mode or vary the circumstances or conditions upon which the statute makes the right depend.—*Boyd v. Holt*, 296.
 16. *Same; act relating to, approved February 12, 1875, construed*.—The "act to authorize the redemption of lands sold for taxes and purchased by the State," approved February 12, 1879, confines the right of redemption, upon the terms therein prescribed, to lands sold between the first day of January, 1866, and the first day of January, 1878, and the office of its fourth section, which allows the redemption of parts or parcels of lands "heretofore sold for taxes," without specially confining the redemption to lands sold between the times mentioned in the first section, is to confer the right to redeem part of a tract or parcel of land sold within the prescribed period, without being compelled to redeem the whole tract, and not to extend the right to all lands, no matter when sold.—*Ib.*
 17. *Injunction to restrain the collection of tax illegally assessed; when does not lie*. An injunction will not lie to restrain the collection of a tax illegally assessed by municipal authorities upon the shares of a national bank in gross, instead of against the individual shareholders, though such municipal corporation be insolvent; there are ample remedies at law.—*National Com. Bank v. Mayor, &c.*, 285.
 18. *Injunction; when should not be granted*.—A tax-payer can not, in the absence of some special equity, bringing his case within the recognized jurisdiction of a court of equity, obtain relief by injunction against a tax, State, county or municipal, because of its illegality.—*Elyton Land Co. v. Ayres*.

TAX COLLECTOR. See OFFICIAL BONDS, 1.

TRUST.

- Indepd Recd 216*
1. *Resulting trust; when arises*.—Where a purchase of lands is made through an agent, who takes title to himself, a trust will result to the principal; or if a trustee employs the funds of a *cestui que trust*, or an agent, the money of the principal in the purchase of lands, the *cestui que trust*, or principal, may elect to hold the agent or trustee personally liable, or to follow the money into the land, or a trust of the legal estate will be declared by implication of law.—*Lehman et al. v. Lewis*, 129.
 2. *Same*.—To constitute a simple resulting trust, where one person's money is used in paying for lands conveyed to another, the money must be paid at the time of the purchase; but when a trustee thus uses trust funds, it is not essential to the *cestui que trust's* equity to charge the lands, that the money be paid at the time of the purchase. The right may be enforced, whether the payment be made before or after the purchase, so long as the trust funds can be traced into specific property, and against all persons except *bona fide* purchasers.—*Ib.*
 3. *Statute of frauds; what trusts not within*.—Such trusts, not arising from or being dependent upon any agreement between the parties, but implied by law from the facts proved, are specially exempted from the operation of the statute of frauds.—*Ib.*
 4. *Resulting trust; what will not create*.—Oral agreements, without the ownership of the money, though cotemporaneous with the purchase, will not create the trust; these, though broken, if there be not fraud or imposition, are within the statute of frauds.—*Ib.*
 5. *Same; what will create*.—If one, by way of loan, and wholly upon the credit and account of another, advance the purchase-money, taking title to himself as security for its repayment, he holds the estate upon a re-

TRUST—*Continued.*

- sulting trust for the other, and on repayment will be compelled to reconvey.—*Ib.*
6. *Same*; *what averments and proof necessary to establish.*—Where a resulting trust is sought to be established and engrafted upon a conveyance absolute in its terms, the complainant must, by his bill, distinctly and precisely aver the facts from which it is claimed to result, and the proof must correspond with the pleading, and must be clear, full, satisfactory and convincing—the burden of removing the presumption arising from the terms of the conveyance, being on the party asserting the trust.—*Ib.*
 6. *Parol trust*; *what evidence necessary to prove.*—Parol trusts, in opposition to the terms of a written instrument, can be enforced only on clear and precise allegation, supported by plain and convincing proof; and a closer correspondence between the pleadings and proof is required in such case than in ordinary causes, for the reason that they are raised and enforced in opposition to the terms of a written instrument.—*Patton v. Beecher*, 579.
 7. *Code*, § 2199 *of, construed.*—Under our present statute (*Code*, § 2199,) and since the *Code* of 1852, a trust in lands, not arising by implication or construction of law, can not be established by parol; but must be created by instrument in writing.—*Ib.*
 8. *Same.*—An express trust, that a grantee of lands, conveyed by deed absolute, expressing on its face a pecuniary consideration, shall hold for the use of the grantor and reconvey to her on request, can not be created by parol; and in the absence of clear evidence of fraud, imposition or mistake, at the time of the execution of the conveyance, the grantee's repudiation of the verbal promise to hold for the use of the grantor, and to reconvey, is not a fraud against which a court of equity can relieve. *Ib.*

See HUSBAND AND WIFE.

UNIVERSITY OF ALABAMA.

1. *Corporation*; *what is not a new one.*—The corporation created by the act of 1820, under the style of the "Trustees of the University of Alabama," has not been dissolved or a new corporation created in its stead, by force of subsequent legislation or the constitution of 1868; but its corporate rights and powers have continued unimpaired until the present time.—*Trustees of University v. Moody*, 389.
2. *Trustees of University*; *powers of.*—The present board of trustees of the University, though their powers have been somewhat changed and enlarged, succeeded to the property, rights and privileges to which the "Board of Education," as "Board of Regents," succeeded under the constitution of 1868, and there being no breach in the continuity of the corporate existence of the University, the present Board of Trustees succeeds to the debts and liabilities of the "Board of Regents," and is answerable therefor at law.—*Ib.*
3. *Board of Education*; *legality of action of.*—Though the legislative power with which the Board of Education was vested, could only be exercised at its regular session at the seat of government, it could lawfully audit and adjust claims against the University, pertaining to it in its corporate capacity as Board of Regents, while the board was at the University and acting as a corporation.—*Ib.*

VENDOR AND PURCHASER.

1. *Vendor's lien*; *when created.*—If one tenant in common sells to another an undivided interest in the lands held by them in common, the vendor has a lien on the interest sold, for the unpaid purchase-money. *Norman v. Harrington*, 107.

VENDOR AND PURCHASER—*Continued.*

2. *Same; what will not defeat.*—The legal title to land sold by the vendor, who took notes and gave bond to convey title upon full payment, passes on his death to his heirs, but they hold it only in trust for the vendee, if he has paid the purchase-money, or if not, that the vendor's lien may be made available against it; and they can not convey it to any one having actual or constructive notice of the executory agreement of sale, so as to cut off the vendee's equity or that of the vendor's administrator to a specific performance; and the notes for the purchase-money pass to the personal representative, and not to the heirs, who holds them in trust primarily for creditors, and next for the distributees of the estate. In equity such a transaction is an equitable conversion of the land into personal property, and intercepts the descent to the heir.—*Masterson v. Pullen*, 146.
3. *Same; what will not defeat.*—The fact that the vendor had not obtained the legal title to the land, but held only a bond for title upon payment in full of the purchase-money, will not deprive him of a vendor's lien on the land, to the extent of his interest therein, when he in turn sells to another on the same terms; but the sub-purchaser will take, subject to the lien (not merely equitable, but legal) of the first vendor, who had retained the legal title for his security.—*Logwood v. Robertson*, 523.
4. *Same.*—In such a case, the sub-purchaser has a right to pay the amount his immediate vendor owed the original seller, as an incumbrance on the title, and to have a credit therefor on the amount due his own vendor; and where this is done and a credit allowed, the sub-purchaser has no cause of complaint that his vendor had not made full payment, and can not set it up to defeat the lien of his immediate vendor.—*Logwood v. Robertson*, 523.
5. *Same; what conveyance subject to.*—Where the legal title has not passed out of the original vendor, a sub-purchaser, who pays the amount due upon the original purchase—it being less than the amount he owes his immediate vendor, who gives due credit, therefor—and receives a conveyance of the legal title direct from the original owner, will take it subject to a lien in favor of his own vendor; and where such payment was made with his own funds, the fact that the sub-purchaser procures title to be made to his wife can not defeat the lien—the wife standing as a mere volunteer, in no better plight than her husband.—*Logwood v. Robertson*, 523.
6. *Partition by tenants in common; vendor's lien on, to what attaches.*—Where, on partition between tenants in common of lands, in which each was seized of an undivided half interest, one is allotted more than his share in acreage and value, executing his note therefor to the other, such cotenant is a vendor as to such excess in value, but his lien attaches only as to such excess, and not to the entire tract allotted; and the particular land in excess not having been ascertained, but the number of acres in excess, in which the vendor parted with his half interest, being determinable from the price agreed to be paid, the vendor is entitled to a lien on one-half interest, or such a number of acres, equivalent to a lien on half that number of acres of the average value of the land allotted the vendee.—*Norman v. Harrington*, 108.
7. *Note for purchase-money; right of transferee of.*—Where a note is given for the purchase-money of land, the vendor retaining title as security for its payment, all the essential incidents of a mortgage attach and a transfer of the debt for the purchase-money passes an equitable right to the assignee, whether the vendor is liable to him or not, to charge the lands with its payment.—*Wolfe v. Null*, 24.
8. *Rescission; what will not authorize.*—Misrepresentations by third persons, whose opinions the vendee sought as to the quality and quantity of land, are not available to procure a rescission, when they were not the agents of the vendor, or acting in his interest or at his request.—*Lindsey v. Veasy*, 421.

VENDOR AND PURCHASER—*Continued.*

9. *Same; what sufficient misrepresentation to authorize.*—Where the vendor makes material false representations as to his seizin and right to convey, which deceived the vendee, and induced him to purchase lands, it is immaterial when rescision is sought, whether the representations were knowingly or ignorantly made.—*Lindsey v. Vesey et al.* 421.
10. *Contract; what authorizes rescision of.*—A vendee imposed on by the fraud of a vendor, may repudiate the contract of purchase, upon its discovery, and recover back the consideration paid; and the fact that the contract of sale is in writing, will not prevent the admission of parol evidence of the fraud or misrepresentation.—*Nelson v. Wood*, 175.
11. *Rescission of contract; what will not authorize.*—The purchaser of lands sold at public auction, in pursuance to an advertisement, which describes the tract sold as containing about fifty-six acres, is not entitled to a rescision of the contract of sale, because he was deceived or misled as to the real boundaries of the tract he was buying, when he fails to show that he did not receive the quantity he bid for, and when the land embraced between the real and supposed boundaries is not shown to have any special value as compared with the average of the tract purchased; and especially is this true, when the tract is shown to have on it a fine residence, and the land between the boundaries is shown to be without improvements, save a fence, and of comparatively little value.—*Davis v. Evans*, 401.
12. *Same; what waives right to claim.*—If the purchaser of lands at such sale, after becoming aware of the misrepresentation, complies with his contract by paying the cash payment and giving notes for the deferred ones, he thereby waives his right to a rescision of the contract.—*Davis v. Evans*, 401.
13. *Mortgage; who not entitled to protection against, as bona fide purchaser.*—Though the vendee holds the vendor's deed, reciting full payment of the purchase-money of lands, one dealing with the vendee with reference to such lands, with knowledge that the purchase-money is not fully paid, is put on inquiry as to the amount due the vendee, which would lead to the ascertainment of the extent of the lien, if not waived; or if waived, of the security the vendor had taken in lieu of it; and if such purchaser being thus put on inquiry fails to make proper inquiry, relying on the vendee's statements, he can not claim protection against a mortgage on the lands, executed by the vendee to the vendor, to secure payment of the purchase-money, on the ground of want of actual notice of its existence.—*Foster, Neville & Co. v. Stallworth*, 547.
14. *Bona fide purchaser; who is not.*—A vendee, who neither avers nor proves that he has paid the purchase-money in full or in part, is not entitled to protection as a bona fide purchaser.—*Masterson v. Pullen*, 146.

WARRANTY.

1. *What constitutes.*—A bare representation or assertion of the quality of the thing sold, if so understood and intended by the parties, will amount to a warranty; hence, when there is evidence that such was the intention and understanding of the parties, though there was no express demand for a warranty, a charge that the "purchaser must buy on his own responsibility or ask a warranty," is properly refused, as tending to take away from the jury all consideration of evidence of a warranty voluntarily made or arising out of the circumstances attending the transaction.—*Claghorn v. Lingo*, 230.
2. *Agent; power of, to give warranty.*—A general agent to sell, without express authorization from his principal, may bind him by such express stipulations as are usual and customary in effecting the sale; and though in some cases—as the sale of a slave, &c., where the agent gave a warranty of soundness—the court will declare the extent of the agent's authority in this particular, as matter of law, the extent of the agent's authority to bind his principal by express stipulations, is, in general, a question for the determination of the jury, in view of what is usual and

WARRANTY—*Continued.*

customary with reference to such sales.—*Herring, Farrell & Sherman v. Skaggs*, 180.

WILLS.

1. *Construed.*—A died, leaving a will, which contained the following clause: "Whereas, I have heretofore given to my sons, B. B. Whorton and J. M. Whorton, and to my daughter Louisa (Mary Moragne heirs, eighteen hundred dollars only,) property worth, in my estimation, two thousand dollars each. Now, I will and devise that my wife Elizabeth pay to each of my other children the said amount of two thousand dollars each, as they become of age or marry, and to the heirs of Mary Moragne two hundred dollars, to make them equal. And I further will and bequeath any property remaining after the decease of my wife, of all kinds and descriptions, to be equally divided between my children, share and share, equal and alike." Appellant and the widow of testator were appointed and qualified as executors of his will. Soon after his death, the whole of his realty, and the bulk of his personalty, passed into the possession and exclusive control of his wife, who retained the same until his death, some fourteen years afterwards, paying off the legacies, charges upon his estate by the will. After her death, the appellant, as surviving executor, took possession of the property, and, under orders of the probate court, sold it for division. *Held* :
 1. That under this will, the wife of the testator took the absolute property in the estate, real and personal.
 2. That after the death of the wife, the appellant was without authority to sell the land or personalty; and that orders of sale for division made by the probate court on his application as executor were invalid, conferring on that court no power to hold him accountable as executor for moneys arising from sales made under such orders.—*Whorton v. Moragne*, 201.
2. *Dower; what excludes wife from.*—At the common law, gifts or devises to the wife by the husband did not operate to exclude her dower, unless such intent was expressed, or the incompatibility of dower and the gift or devise was clear or manifest; but our statutes have changed this common law principle, and the presumption now is that a gift, bequest, or devise to the wife is intended to exclude her not only from dower, but the share of the personal estate to which she is entitled under the statutes of distributions, unless the contrary is expressed, or clearly appears from the will.—*Dean v. Hart*, 309.
3. *Dissent from will; effect of, under the statutes.*—Under our statutes, the effect of the widow's dissent from the provision made for her in the husband's will, is to blot them out of the will, and leave them as if, from death or any other cause, she had become incapable of taking; and whatever she renounces, of necessity results to the indemnity of those who are injured by her renunciation.—*Ib.*
4. *Construed.*—Testator, by will, devised and bequeathed all his estate to his wife and infant daughter jointly, and on the death of either, the survivor to take the whole, and on the death of both, remainder to the legal heirs of the daughter. The wife dissented from the will, and elected to take dower and share in his personal estate, as though testator had died intestate. *Held* : 1. The daughter became entitled to the remainder of the estate for life, taking a life estate only, and her legal heirs take at her death, by purchase, and not by dissent. 2. The probate court cannot order money in the hands of the testator's personal representative to be paid over to her, and discharge him from liability; a court of equity alone has jurisdiction to give the daughter the option of taking the money, upon proper refunding bond, or to loan it on interest, the interest being paid to her annually during life.—*Dean v. Hart*, 309.
5. *Same.*—Testator gave personalty and devised certain lands to his wife. The

WILLS—Continued.

will directed, "as soon after death as my executor shall deem expedient, he shall sell all the balance of my property," real and personal, "either at public or private sale, and on a credit or for cash, at his discretion," and that the proceeds should be divided equally between testator's wife and children. By the will, R., a brother of testator, was appointed executor of the will, and guardian of the children, and it further provided, in event R. should die before testator's death, B. should be executor. *Held*: 1. This was simply a devise or direction to the executor to sell property not specially devised, and not a devise to them with directions to sell, and did not intercept the descent to the heirs. 2. The power was not a naked power of sale, within the meaning of the statute (Code, § 2218), which passes to the successor in the trust but a *discretionary power*, resting in the personal confidence reposed in the executor, constituting a personal trust, which could not pass to an administrator with the will annexed.—*Mitchell v. Spence*, 450.

6. *Same*.—The testator, who seems to have owned quite a large estate, both real and personal, commenced the preparation of his will on the 2d day of February, 1838, and on that day inserted a clause by which he gave to his wife Sarah certain tracts of land, and stock, provisions, and "all my negroes, both male and female, with the following restrictions, that is to say: That as my children become of age or marry, they are to have two grown negroes each, and as many more as my wife may think proper to give. I mean, when I say stock and furniture of all kinds, horses, cows, hogs, carriages, wagons, plantation tools, and everything as it is now—all during her life or widowhood; but if she should marry or die, then and in that case, it is my will that all the property I have left her should be sold." This clause then forbids the negroes being sold separately, and continues, "and this [I] enjoin on my beloved wife, in case she does not [marry], and, in case she marries, she is to have ten thousand dollars, to be paid her by my executors, to do as she pleases with." The will was not completed on that day, and, three days afterwards, February 5th, 1838, the testator added this clause: "Being still in my proper senses, and on a further consideration of all the matters and things, I have thought proper to alter a part of the first part of my will—that is, that in case my beloved wife never marries, I wish for her to have five thousand dollars worth of property left her her life time, or widowhood, she having choice of it, to be hers forever, to do as she may think proper with. And, further, by Mr. Aaron Ready, putting in what I have given him heretofore, and his having rendered services which the others could not do, I give him, extra, two thousand dollars. Now, in explanation of this will, as it is done just on my starting to New York, and in a hurry, my will is that the five thousand dollars may be taken out of what I give my beloved wife, and the two thousand dollars extra, which I give to Aaron Ready." On the same day, the will was duly executed and attested.

Testator died in the year 1840, and his will was duly probated the same year.

Aaron Ready and one Banks qualified and acted as executors until the year 1852, when both died. They made several partial settlements, and the estate was finally settled by an administrator *de bonis non*, in 1863, except as to the reversionary interest in the property given to Mrs. Sims. She died in the year 1874, without having married again. The appellee was appointed administrator *de bonis non*, and, within less than three years after Mrs. Sims' death, paid the amount of the legacy to Ready to his personal representatives.

Held: 1. The clause of February 5th must be treated and construed as a codicil to that part of the will written before that time, but not as revoking or abrogating the first clause further than necessary to give effect to its terms. 2. The bequest to Ready was demandable after the expiration of eighteen months from the probate of the will, and not postponed until the death of Mrs. S., and, having been allowed to remain unpaid for more than twenty years, became a stale demand, which

WILLS—Continued.

the administrator *de bonis non* paid on his own wrong, and for which he is not entitled to credit in his settlement.—*Hemphill v. Moody*, 510.

WITNESS.

1. *Competency of, under act of March 2, 1875.*—The act of March 2, 1875, (now forming § 3058 of the Code of 1876), is, in its nature and character, a revision of, and substitute for all former statutes touching the competency of parties as witnesses, and furnishes the only rule by which the competency of parties is to be determined in suits or proceedings before any court or officer other than criminal cases, and necessarily repealed former statutes on the subject, though containing no express words of repeal; and among the statutes so repealed is that making the parties competent witnesses in suits before justices of the peace, when the matter in controversy does not exceed twenty dollars. *Lemay v. Walker*, 39.
2. *Competency of.*—Section 2302 of the Code of 1852, which changed the common law disqualification of witnesses, except in cases of perjury, &c., leaving the conviction as a matter directed to the credit of the witness, was omitted from subsequent revisions of the statutes; and, being a law of a permanent and general nature, its omission under the provisions of the subsequent Codes, worked its repeal, leaving the common law rule as to the competency of witnesses in full force, except as altered by legislation.—*Taylor v. The State*, 164.
3. *Same.*—At the common law, a person duly convicted of burglary or grand larceny, was rendered infamous, and our statutes not having changed the common law rule, such person is not a competent witness.—*Ib.*
4. *Who not competent.*—A former partner seeking an account and settlement of the partnership dealings against the administrator of a deceased partner in such case, is not a competent witness, in his own behalf, to prove any transaction by, or statement with deceased, unless first called to testify thereto by the opposite party; and the fact that he was interrogated by the defendant as to other matters, does not vary the rule. *Causler v. Wharton*, 359.
5. *Same.*—A party to a suit is not an incompetent witness, unless the case involves a direct immediate conflict between the rights of the living and those of the estate of a deceased person; and then he is only incompetent to testify as to transactions with, and statements by the deceased; and the burden of showing his incompetency rests on the person objecting to his evidence.—*Ala. Gold Life Ins. Co. v. Sledge*, 566.
6. *Evidence; what admissible.*—A party may testify as to transactions had with a partnership, of which one of the members has since died, although the personal representative and heirs of such deceased partner are parties to the suit; it not appearing that the transaction was with the deceased partner.—*Ib.*
7. *Expert; who is.*—The owner of a tan-yard, who has been engaged in the business of tanning for twenty-three years, "seeing the work going on, and knowing how it was done," is an expert as to such matters, though he may have employed others to do the work for him, and is not a "practical tanner."—*Nelson v. Wood*, 175.
8. *Evidence; what admissible.*—The enmity or unfriendliness of a witness to the person against whom he testified, may be shown to enable the jury the better to determine, in connection with other evidence, what weight should be accorded to the witness; but it is not permissible to prove the details of a quarrel or difficulty which gave rise to the enmity or unfriendliness.—*Polk v. The State*, 237.
9. *Same.*—Persons observant of and familiar with the intercourse between others, and conversant with the state of feeling, as shown by their conduct and conversation, may testify as to a fact whether or not enmity or ill feeling existed between them.—*Ib.*

WRIT OF POSSESSION.

1. *What not sufficient execution of.*—A plaintiff, in whose favor a writ of possession issued, rode around the lands with the sheriff, who said to him : “Here is your land—I put you in possession ;” but tenants who were in possession were not dispossessed, nor was any notice given them to yield possession. *Held* : This was not an execution of the writ of possession.—*Lankford v. Green*, 315.

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